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The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States

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The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States

URS W. SAXER

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The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States

URS W. SAXER*

"Indeed, whereas Marx once described the tsarist Russian empire as the prison of nations, and Stalin turned it into the graveyard of nations, under Gorbachev the Soviet empire is rapidly becoming the volcano of nations."¹

I. INTRODUCTION: THE REVOLT OF THE SOVIET UNION'S REPUBLICS

This Article examines the successful revolt of the republics of the Soviet Union against the Communist-dominated center and assesses the legal implications of these revolutionary developments. First, this Article considers the beginning of the Soviet Union as a socialist federation, because many changes in the Soviet Union since 1985 are best understood against the background of the country's burdensome past. The Soviet republics and nationalities briefly experienced freedom and autonomy between 1918 and 1922. Yet, even this experience was overshadowed by civil war, economic difficulties, and an emerging totalitarian ideology. The conclusion of a union treaty between the republics in 1922,² under the dominating leadership of the Communist

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This Article was originally presented in 1990 to a colloquium on constitutionalism in eastern Europe at the Columbia University School of Law. The subsequent events in the Soviet Union necessitated many amendments to that first version. Due to the rapid speed of developments within the Soviet Union, it was impossible to address all of the legal problems arising from the transition process in this Article.

The author would like to express his gratitude to Professor Louis Henkin of the Columbia University School of Law for his constructive criticism and for important suggestions made on an earlier draft; to Marlene Cassidy, Esq., who carefully corrected this Article and persistently encouraged the author to publish in the United States; and to Brian Pointon, Esq., for his valuable comments on an earlier draft.

1. Zbigniew Brzezinski, *Post-Communist Nationalism*, FOREIGN AFF., Winter 1989-90, at 1.

2. See Treaty on the Formation of the Union of Soviet Socialist Republics, Dec. 30, 1922 [hereinafter Treaty on Forming the USSR], reprinted in USSR: SIXTY YEARS OF THE

party, brought the freedom of the republics to a definitive end. The authoritarian communist regime replaced the autocratic regime of the tsars. Subsequent developments resulted in the complete loss of local autonomy and the oppression of the various nationalities in a system of government that was federalist in form, but not in substance. The 1922 Union Treaty did not create a balance of power between the central government in Moscow and the constituent nationalities and republics. Instead, it served as a legal basis for the establishment of centralized communist rule in all of the republics.

Nevertheless, the 1922 Union Treaty served as a compact between the then-sovereign republics, under which the Soviet Union became a particular type of federation. The 1922 Union Treaty granted the Soviet Union's component members the right to secede, but simultaneously created a highly centralized state structure. Although the republics were labeled sovereign states, they lacked the attributes of statehood. Despite such double standards, the formal scheme of a federation remained in place during the more than seventy years of communist rule. The idea of a federation survived, but it was transformed and rendered meaningless.

President Mikhail S. Gorbachev's policies of *glasnost* and *perestroika*,³ which were designed to allow more political openness and restructure the country's policies, began the process of recuperation from these experiences. Not surprisingly, this process also reached the issue of the country's union. It eventually resulted in the disintegration of the communist system and the dismemberment of the Soviet Union as a country.

The policies of *glasnost* and *perestroika* allowed the republics to develop new approaches to the Soviet Union's future shape. The republics' declarations of sovereignty⁴ or independence⁵ between 1988

UNION, 1922-1982, at 164-68 (Progress Publishers ed., 1982) [hereinafter USSR: SIXTY YEARS].

3. *Glasnost* means "openness," and denotes President Gorbachev's policy of political openness, which allowed unhampered criticism of the state. *Perestroika* means "restructuring," and denotes the policy of fundamental change in the entire Soviet system of government. See Rett R. Ludwikowski, *Soviet Constitutional Changes of the Glasnost Era: A Historical Perspective*, 10 N.Y.L. SCH. J. INT'L & COMP. L. 119, 119-24 (1989).

4. Between 1988 and 1990, all of the union republics, and most of the autonomous republics and regions, promulgated declarations of sovereignty. Estonia's legislature took the first step on November 16, 1988, when it claimed political and economic sovereignty over the republic's land, natural resources, industry, banks, and infrastructure. See generally Igor Gryazin, *Constitutional Development of Estonia in 1988*, 65 NOTRE DAME L. REV. 141 (1990). Lithuania's legislature made similar declarations in May 1989, as did Latvia's legislature in July 1989. Martha Brill Olcott, *The Lithuanian Crisis*, FOREIGN AFF., Summer 1990, at 35

and 1990 were stirring expressions of the republics' new self-confidence. The doctrinal bases of these declarations were the 1922 Union Treaty and the union constitutions, which stated that the republics possessed a right to secede.

The subsequent power struggle between the communist center and the Soviet republics, and the Soviet Union's attempt to find a new equilibrium, provided an excellent study of strong separationist tendencies destroying an existing federation and its integrative forces. These developments revealed the future shape of the Soviet Union to be its most important political issue—one upon which issues of economic reform, disarmament, and democratization completely depended. Further, this power struggle became not just an internal matter of the Soviet Union, but also a major concern to the world community. The ramifications of a superpower shaken by a crisis in which the constituent members demanded a share of the Soviet Union's nuclear and conventional arsenals, gold resources, and natural wealth were immense.⁶ By 1990, the independence-minded Soviet republics were asking for formal recognition as members of the inter-

[hereinafter Brill Olcott, *The Lithuanian Crisis*]; *Latvian Supreme Soviet Session*, BBC SUMMARY OF WORLD BROADCASTS, Aug. 8, 1989, available in LEXIS, Nexis Library, PAPERS File. On June 12, 1990, the legislature of the Russian Soviet Federated Socialist Republic adopted a declaration on the republic's sovereignty by an overwhelming majority. See DECLARATION ON THE STATE SOVEREIGNTY OF THE RUSSIAN SOVIET FEDERATED SOCIALIST REPUBLIC, reprinted in BASIC DOCUMENTS ON THE SOVIET LEGAL SYSTEM 139-41 (W.E. Butler ed. & trans., 2d ed. 1991) [hereinafter BASIC DOCUMENTS]. Similar declarations followed in Ukraine on July 17, 1990, and Byelorussia on July 27, 1990. See *Ukraine, Byelorussia Declare Sovereignty*, CURRENT DIG. SOVIET PRESS, Aug. 29, 1990, at 8. Subsequently, the Soviet Union saw a veritable flood of such declarations. See Martha Brill Olcott, *The Soviet (Dis)union*, 82 FOREIGN POL'Y 118, 126-29 (1991) [hereinafter Brill Olcott, *The Soviet (Dis)union*].

5. Lithuania declared its independence on March 11, 1990. See Law of the Lithuanian Republic on the Restoration of the Effect of the Constitution of Lithuania of 12 May 1938, reprinted in BASIC DOCUMENTS, *supra* note 4, at 145. Latvia followed suit on May 4, 1990. See *Rejecting Calls for a Referendum, Deputies Vote for Independence, Announce a 'Transitional Period'*, CURRENT DIG. SOVIET PRESS, June 6, 1990, at 13. Estonia declared its independence on May 8, 1990. See *Estonia: Supreme Soviet Reinstates 1938 Constitution's Provisions on Republic's Independence*, CURRENT DIG. SOVIET PRESS, June 13, 1990, at 17; see also Brill Olcott, *The Lithuanian Crisis*, *supra* note 4, at 30; Gregory Gleason, *Soviet Federalism and Republican Rights*, 28 COLUM. J. TRANSNAT'L L. 19 (1990). In subsequent referendums held in Lithuania on February 10, 1991, and in Latvia and Estonia on March 3, 1991, between 73% and 90% of the voters favored independence. See Francis X. Clines, *Lithuanian Voters Add to Relentless Prodding*, N.Y. TIMES, Feb. 11, 1991, at A2; Francis X. Clines, *In Latvia, Even Many Russians Vote Independence*, N.Y. TIMES, Mar. 5, 1991, at A3.

6. See Dimitri Simes, *Gorbachev's Time of Troubles*, 82 FOREIGN POL'Y 97-98 (1991); ROBERT G. KAISER, WHY GORBACHEV HAPPENED: HIS TRIUMPHS AND HIS FAILURE 160, 172-73 (1991).

national community.⁷ Moreover, because overwhelming global economic, demographic, and ecological problems required close cooperation among powerful and stable partners, the world community increasingly speculated about who would represent the union in the future.⁸

Thus, since 1988, a fundamental change in the internal balance of power in the Soviet Union has confronted the world. The political developments in the Soviet Union demonstrated the increasingly powerful position of the Soviet republics in domestic as well as foreign affairs, while the main unifying forces of the Soviet Union—the Communist party, the centrally planned economy, and the Red Army—decayed.

Negotiations regarding a new union treaty between the republics and the Communist-dominated center took place against this backdrop. The draft treaties proposed in the first half of 1991 indicated the possible nature of the future union: (1) strong republics able to defend their sovereignty; (2) a weak center dependent on the political support of the republics; (3) an autonomous role for the republics in international relations; and (4) a voluntary union giving each republic the right to choose not to participate in it.⁹ Although the republics appeared to be the main pillars of this prospective union, the draft treaties left unanswered the crucial question of supremacy. Thus, they stopped short of creating an explicit confederation, reflecting a political stalemate regarding the basic issue of who would have supreme power in the union.

Exactly one day before the planned signing of the new union treaty on August 20, 1991, conservative centrist forces attempted to restore the old, center-dominated system.¹⁰ They were supported by reactionary factions within the Communist party, the Committee on State Security ("KGB"), and the Red Army. By announcing a coup, they aimed to turn back history. However, the coup never gained momentum and failed within three days due to strong resistance in the republics, particularly the Russian Soviet Federated Socialist Re-

7. This was particularly true with regard to the Baltic nations. See *infra* notes 344-48 and accompanying text.

8. See *infra* notes 460-88 and accompanying text.

9. For a further analysis of the pre-coup draft treaties, see *infra* part VI. The last pre-coup draft was published in PRAVDA, June 22, 1991, at 3, translated in FBIS-SOV-91-124, June 27, 1991, at 23-32 [hereinafter Revised 1991 Draft Treaty]. For an initial assessment, see John Lloyd & Chrystia Freeland, *Soviet States Offered Power*, FIN. TIMES, June 26, 1991, at 1.

10. See *infra* notes 502-09 and accompanying text.

public ("RSFSR").¹¹ The coup's failure confirmed that the changes in Soviet society and the Soviet system of government, as initiated by the policies of *glasnost* and *perestroika*, were irreversible. The events following the coup made it clear that the old communist center had ceased to exist. When the power struggle was decided, the republics won the battle against the center and obtained supremacy. Under the leadership of the most powerful republic, Russia, the republics were able to seize the remaining powers of the old center. The republics then formed a transitional government structure in which representatives of each republic had ultimate authority.¹² Simultaneously, the Baltic republics were able to attain international recognition as independent states because the other Soviet republics did not object to their independence. Less than four weeks after the failed coup, the Baltic states received full membership status in the United Nations.¹³

Following the unsuccessful coup in August 1991, the Soviet Union underwent a transition from a federation with strongly centralized authority to a loose *de facto* confederation of republics. The events in the aftermath of the failed coup eliminated any ambiguities as to the future shape of the Soviet Union: If there were a union, it would be in the form of a confederation. The creation of the Commonwealth of Independent States ("CIS") in December 1991 confirmed this proposition.

This Article uses the formal distinction between a federation and confederation as a means of explaining the rise and fall of the Soviet Union, and the complementary rise and fall of the Soviet republics. Although the terms "federation" and "confederation" defy simple comprehensive definition, they are not mere self-serving terms of art.¹⁴ The concepts underlying these terms help explain the important distinctions as to how power is exercised in a given entity. The terms also denote different types of legal identities, as they serve as a basis for determining statehood in international law. In addition, the terms relate to the recognition of states and governments by other countries and international organizations. To understand the developments in the Soviet Union in general, and those between 1988 and 1991 in particular, the distinction between a federation and a confederation is of paramount importance.

11. See *infra* notes 510-15 and accompanying text.

12. See *infra* notes 567-80 and accompanying text.

13. See *infra* note 548 and accompanying text.

14. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 291-93 (1979).

In international law, states are basically entitled to define their legal and political relations with other states. Adhering to a concept of broad sovereignty and independence, individual nations may attempt to avoid international obligations whenever possible. Yet, these nations may also prefer to cooperate in the framework of international organizations, while retaining autonomy to implement such organizations' proposals. Individual nations may decide to coordinate their policies with other states on the basis of international treaties or common political understandings. They may go even further and unify policies by transferring power in some areas to an international body, while retaining sovereignty in other areas. Finally, individual nations may decide to merge with other states, and, thus, give up statehood as it is understood in international law.

A confederation is just one of many options. International law defers to the choices made by states, which are the principal components of the international political system.¹⁵ Consequently, there are a variety of ways that a state may choose to deal with common problems in the international community.¹⁶ Since September 1991, the former Soviet republics have experimented with various forms of cooperation. Their experiments have ranged from mere intergovernmental coordination and contract-based cooperation to the establishment of common economic and political institutions. The creation of the CIS institutionalized this process of cooperation in a confederative framework. However, the concept of a confederation is insufficiently defined to allow definitive conclusions regarding the positions of the newly independent states.¹⁷ Their positions will depend upon the viability of the CIS and the further arrangements made by the former Soviet republics.¹⁸

II. THE LEGAL FRAMEWORK OF FEDERATIONS AND CONFEDERATIONS

A. *Federalism as the Exception, Unitarianism as the Rule*

Few states in the world community are federations.¹⁹ For former

15. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 introductory note (1987).

16. See CRAWFORD, *supra* note 14, at 288-97.

17. See *id.* at 291-95.

18. See *id.* at 288 (arguing that a union of states should be classified as a federation or confederation by examining that particular union, and not by considering an *a priori* category).

19. Countries with a federal system include Australia, Austria, Canada, Czechoslovakia, the Federal Republic of Germany, India, Switzerland, and the United States. Although in

colonial states in particular, national unity, undivided sovereignty, and strongly centralized institutions are of paramount importance to self-determination and independence.²⁰ In addition, most western European countries have basically unitary governmental structures.²¹ Originally, a unitary structure was necessary in order for a developed country to exercise control and to establish an administrative structure. Currently, however, unitary structures are necessitated by the demands of the welfare state and its inherent centralizing tendencies.²² The communist world almost completely relied on centralized

practice these systems differ considerably, they all have three levels of government: (1) a federal government; (2) state governments; and (3) local governments. For an assessment of the features of federations, see *infra* notes 33-47 and accompanying text.

20. See Thomas Fleiner-Gerster, *Preface* to *FEDERALISM AND DECENTRALIZATION* 13 (International Association of Constitutional Law ed., 1987). Generally, developing countries adhere to a concept of strong national sovereignty in international law. See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 125-30 (2d ed. 1979).

21. There are essentially only three acknowledged federations in Western Europe: Austria, Switzerland, and Germany. See MICHAEL BURGESS, *FEDERALISM AND FEDERATION IN WESTERN EUROPE* 14, 23 (1986). However, the process of European integration has established a supranational governmental structure, which has weakened the European Community ("EC") member states' sovereignty in both internal and foreign affairs. See, e.g., Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585. In *Costa*, the Court of Justice of the European Communities held:

By contrast with ordinary international treaties, the Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community with unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

Increasingly, some authors consider the EC to be an emerging federation, or at least a confederative structure with strong federal elements. See Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990) (advocating the view that the EC is a particular type of federation). Less far-reaching are the conclusions of George A. Bermann, *The Single European Act: A New Constitution for the Community?*, 27 COLUM. J. TRANSNAT'L L. 529 (1989).

22. See Yoichi Higuchi, *La décision de la décentralisation* [*The Decision to Decentralize*], in *FEDERALISM AND DECENTRALIZATION*, *supra* note 20, at 23-24 (maintaining that the heightened powers of the welfare state and the "warfare state" lead to bureaucratization, which is detrimental to individual freedoms and local autonomy). This is the case in Switzerland, where social welfare is foremost a federal, not state, power. See Thomas Fleiner-Gerster, *The Concept of the Constitution (Switzerland)*, in *FEDERALISM AND DECENTRALIZATION*, *supra* note 20, at 147.

In the United States, the Supreme Court has diminished the vitality of the Tenth Amendment to the United States Constitution, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X; see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), *overruling* *National League of Cities v. Usery*, 426 U.S.

institutions to direct many aspects of daily life, even though the Soviet Union ostensibly had a federal system.²³ Only a strong, centralized government could provide the Communists with the authority necessary to control society in a manner consistent with their ideology.

B. Federalism and Decentralization

Some unitary nations follow a policy of administrative decentralization to better meet the needs of regions, local governments, and minorities.²⁴ The preference for administrative decentralization over

833 (1976). In *Garcia*, the Court relied primarily on the political safeguards of federalism to preserve states' interests. See *id.* at 537-47. See generally HERBERT WECHSLER, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 49 (1961). On the other hand, courts have broadly construed the Commerce Clause to give the federal government almost unlimited power over economic and social regulations. U.S. CONST. art. I, § 8, cl. 3; see, e.g., *McCulloch v. Maryland*, 17 U.S. 316 (1819).

23. Both the Soviet Union and Yugoslavia were federations before their demise. The Yugoslav Federation was restructured in 1974, establishing a unique cooperative and consensual federal system in which the republics and autonomous republics were equal to each other and the federation as a whole. See Lidija R. Basta, *The Yugoslav Federation (also) as a Common Function of the Republics and Provinces—The New Content of Autonomy of the Federal Units*, in FEDERALISM AND DECENTRALIZATION, *supra* note 20, at 113-25. Poland, which is more centralized than the former Soviet Union or Yugoslavia, began to develop a system of territorial self-government in 1982, by enacting a system of people's council and territorial self-government. See Witold Zakrzewski, *Nouvelle loi sur l'autogestion territoriale en Pologne* [The New Law on Self-Government in Poland], in FEDERALISM AND DECENTRALIZATION, *supra* note 20, at 155-72; Sylwester Zawadzki, *Decentralization and the Optimisation of the Local Decision-Making Process*, in FEDERALISM AND DECENTRALIZATION, *supra* note 20, at 173-82. In contrast, China is a unitary state with some autonomous regions of ethnic and national minorities. See Youyu Zhang, *La décentralisation en République Populaire de Chine* [Decentralization in the People's Republic of China], in FEDERALISM AND DECENTRALIZATION, *supra* note 20, at 481-88.

24. Poland is an example of a socialist country following this approach. See Zawadzki, *supra* note 23, at 173-75; Zakrzewski, *supra* note 23, at 155-72. Decentralization, autonomy for local and regional governments, and improvement of the performance of local administrations are topics of great political and legal import in most unified states, whether industrialized, socialist, or developing. See generally FEDERALISM AND DECENTRALIZATION, *supra* note 20. Decentralization aims to enhance local autonomy and improve center-periphery relations. However, the results of such efforts are inconclusive. For example, France, a unitary state, could not solve or even ease the Corsican problem. Great Britain's problems with Northern Ireland are similar. See David Foulkes, *Constitutional Problems of Territorial Decentralization in Federal and Centralised States (United Kingdom)*, in FEDERALISM AND DECENTRALIZATION, *supra* note 20, at 77-83; Louis Favoreu, *La décision de décentralisation et le statut des collectivités territoriales* [The Decision to Decentralize and the Role of the Territorial Subentities], in FEDERALISM AND DECENTRALIZATION, *supra* note 20, at 51-61. Administrative decentralization is primarily advantageous to the central government. Local administrations within the framework of a strong hierarchy must implement the central government's decisions and carry the administrative burden of welfare without obtaining genuine decision making powers. This is common in decentralized states as well as some federal welfare states.

"federalizing" the structure often is based upon a distrust of federalism²⁵ and the theoretical advantages of a unitary system. In theory, the unitary state enjoys several advantages over the federal state. These advantages include (1) national uniformity of policy and law making; (2) clear allocation of power and a clear power structure; (3) clear political and administrative responsibilities; (4) simpler, less expensive enforcement procedures; and (5) no requirement of finding a political consensus within territorial subentities. On the other hand, federal states employ a costly multitiered system consisting of legislative, administrative, and judicial branches.²⁶ Therefore, in federal states, additional political or legal procedures are necessary to channel vertical and horizontal power conflicts.²⁷

Decentralization differs from federalism²⁸ because power is not vertically redistributed in a decentralized system. Rather, power remains in the center, thus enabling it to narrow, change, or even abolish the autonomy of local bodies. Furthermore, in a decentralized

See Higuchi, *supra* note 22, at 26; Fleiner-Gerster, *supra* note 22, at 146-48; see also Paul J. Mishkin, *Autonomy of Decentralized Units in the United States of America*, in *FEDERALISM AND DECENTRALIZATION*, *supra* note 20, at 245-46 (discussing decentralization in the United States); John Bridge, *The English System of Local Government*, in *FEDERALISM AND DECENTRALIZATION*, *supra* note 20, at 427-37 (discussing the considerable responsibilities of local governments in the British welfare system).

25. For an example of such distrust, see the conclusion of the British Royal Commission on the Constitution, which was appointed in 1969 to examine governmental functions and relations among the United Kingdom and its countries, nations, and regions. According to the commission, federalism is at best "an awkward system to operate," slowing down political change and preserving an inflexible system of government. See Foulkes, *supra* note 24, at 80-81.

26. See generally Lenaerts, *supra* note 21.

27. Awareness of the theoretical advantages of a unitary structure may explain why attempts to decentralize often have been timid and carried out under the center's strict political and legal control. Unitary states avoid vertical power sharing, and delegate only limited powers to local authorities. However, this does not necessarily imply that local governments are insignificant. Only totalitarian states abstain from granting some political freedoms. In most countries, including developing states, there is a tradition of local self-government. For example, Tunisia granted local freedoms as early as 1858. See Yadh Ben Achour, *Quelques aspects de la décentralisation territoriale en Tunisie* [Some Aspects of Territorial Decentralization in Tunisia], in *FEDERALISM AND DECENTRALIZATION*, *supra* note 20, at 127-37. A similar tradition may be found in Zaire. See Dheba Chele Dhedonga, *L'autonomie des entités décentralisées au Zaïre* [Autonomy of Decentralized Entities in Zaire], in *FEDERALISM AND DECENTRALIZATION*, *supra* note 20, at 207-20. Turkey, under Ottoman rule, also developed a culture of local self-government. See Suna Kili, *Partially Decentralized Decision-making Bodies Within a Centralized Political System: The Case of Turkey*, in *FEDERALISM AND DECENTRALIZATION*, *supra* note 20, at 226-28.

28. For a general discussion of federalism, see Walter Rudolf, *Federal States*, in 10 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 165, 166 (Rudolf Bernhardt ed., 1987).

system, local governments may lack the power to participate or may play only a minor role in the decision making process.²⁹ The center's legitimacy in such a system does not depend upon support from the local bodies, since it does not receive its power from the component entities.³⁰ Instead, the center delegates limited authority to the local bodies. In turn, the local entities lack both formal legitimacy³¹ and the characteristics of states, such as territory, citizens, and legislative, executive, and judicial power.³² The reluctance of unitary states to establish new and powerful intermediate government structures makes it unlikely that the center's authority will ever seriously be challenged, as hundreds or thousands of local bodies cannot easily organize and reach a consensus.

C. Common Features of Federations

1. General Remarks³³

The existence of many types of federations, ranging from the small and highly decentralized, such as Switzerland, to the centralized and multinational, such as the Soviet Union prior to 1988, indicates the complexity of defining federalism.³⁴ The various rationales used to justify the establishment of a federation serve to create different forms of federations. Each federal system has an "equilibrium" of

29. For example, local bodies are not represented in the government of the United Kingdom, and, in France, the Senate has almost no political or legal power. See Favoreu, *supra* note 24, at 55-56.

30. The United States and Switzerland are examples of a system in which the central government derives its power from the component entities. See Lenaerts, *supra* note 21, at 206. But see Louis Henkin, *Discussion, in* FEDERALISM AND DECENTRALIZATION, *supra* note 20, at 400 (stating that "[w]e, the people" ordained the United States Constitution and central government, not the states).

31. In the United States and Switzerland, enhancing the constitutional powers of the federal government requires a majority vote of the states or cantons. However, in decentralized countries such as France, the United Kingdom, and China, the national legislature delegates authority to local units. See Favoreu, *supra* note 24, at 57-59; Foulkes, *supra* note 24, at 78-79; Bridge, *supra* note 24, at 427; Zhang, *supra* note 23, at 487-89.

32. See Rudolf, *supra* note 28, at 165-66 (asserting that the crucial distinguishing feature of federal and decentralized states is the legal status of the constituent members).

33. The following remarks identify some typical features of federations. These features are often subject to modifications and exceptions that do not affect the characterization of a country as a federation. See generally Lenaerts, *supra* note 21, at 205. However, as these exceptions increase, other categorizations are more likely to apply. See Robert C. Lane, *Federalism in the International Community*, in 10 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 28, at 178, 178-81.

34. Henkin, *supra* note 30, at 399 (stating that federalism is not born of any political theory, but is rather "a pragmatic improvisation to meet a particular situation"); see also CRAWFORD, *supra* note 14, at 288-89, 291-93.

its own, and each differs as to the balance of power between the federation and its component entities.³⁵

Consequently, there is no single theory of federalism. Problems common to federated systems may be solved according to the particular circumstances of a given federation. However, the necessity of superior political and legal state structures to ensure successful cooperation among adjacent territorial units characterized by religious, linguistic, cultural, economic, or other diversity is always an issue.³⁶ A federation must avoid conflicts between the center and the periphery. Therefore, a federation often results from a pragmatic political compromise intended to solve the potentially conflicting goals of (1) creating a stable system of federal government; (2) preserving the member states' autonomy and diversity; and (3) balancing the tension between unifying and anti-unifying forces that may arise in a federal state. Different countries arrive at this compromise in a variety of ways, and the principal protagonists may vary.³⁷

In some countries, a federation follows an historical evolution, whereby preexisting sovereign units with their own political and cultural identities find enough common ground³⁸ to establish a supreme political union.³⁹ An agreement between these individual states is sometimes the basis for forming a federation.⁴⁰

In other countries, a federation may result from the central government's decision to federalize. This decision either occurs autonomously or results from a bargaining process that includes local governments, minorities, or ethnic, religious, and lingual groups.⁴¹ The existence of several languages, nationalities, or religions, as well

35. Lenaerts, *supra* note 21, at 235.

36. See Henkin, *supra* note 30, at 399 ("Federalism attempted to resolve the tensions between the autonomy of each individual State and their need for some unity."); see also Lenaerts, *supra* note 21, at 205 (arguing that a federal constitution is designed "to strike the appropriate balance of powers between the federation and its component entities").

37. See Lenaerts, *supra* note 21, at 205-06.

38. Examples of a common ground include economics, a common enemy, and topography. See THOMAS M. FRANCK, *Why Federations Fail*, in *WHY FEDERATIONS FAIL—AN INQUIRY INTO THE REQUISITES FOR SUCCESSFUL FEDERATIONS* 121, 121-24 (1968).

39. Examples of such a union include the United States, Switzerland, and the EC. See Lenaerts, *supra* note 21, at 206.

40. See Rudolf, *supra* note 28, at 165. The United States does not belong to this category of federations. See *McCulloch v. Maryland*, 17 U.S. 316 (1819) (rejecting the State of Maryland's argument that courts must consider the United States Constitution to be an act of sovereign and independent states). In contrast, the Soviet Union was a union based on the 1922 Union Treaty concluded by the republics. See Treaty on Forming the USSR, *supra* note 2.

41. See Lenaerts, *supra* note 21, at 206-08 (labeling this method "devolutionary federalism"). Recent examples of countries moving from unity to diversity by redistributing the pow-

as topographical considerations, serves as an incentive to grant power to larger territorial subentities.⁴² Thus, restructuring the power balance is directed toward reconciling societal pluralism, where the component entities reflect linguistic, cultural, ethnic, or simply regional differences, while still maintaining some level of national cohesion.⁴³

Usually, the term "federalism" characterizes a country's territorial subdivision⁴⁴ and vertical power structure.⁴⁵ Although the vertical power structure is most prevalent, a federal system must also stabilize the horizontal axis, which deals with relations among its component entities.⁴⁶ This is necessary because disputes among a federation's component entities may create disturbances that affect the entire federal system of government adversely. As the recent developments in Yugoslavia show, disputes may lead to a system's complete destruction if adequate problem solving mechanisms are unavaila-

ers of a previously unitary state include Belgium, Canada, and Spain. See *id.* at 237 (providing an elaborate analysis of the process of devolution in these countries).

42. In Belgium, Canada, and Spain, linguistic and cultural diversity, in particular, led to the decision to federalize. See *id.* However, the usual choice is to give certain ethnic, lingual, or religious minorities special status within the unitary state. For example, Finland accorded autonomy to the Swedish-speaking minority on the Aaland Islands. See Tore Modeen, *Constitutional Problems of Territorial Decentralization in Federal and Centralized States—Finland*, in *FEDERALISM AND DECENTRALIZATION*, *supra* note 20, at 88-90. A similar accommodation was given to the German-speaking minority in Italy. See Dietrich Schindler, *South Tyrol*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 28, at 348, 348-50. Minority problems differ from the problem of federalism because they pertain more to human rights issues. Several international instruments protect human rights and address minority problems. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, S. TREATY DOC. NO. 2, 99th Cong., 1st Sess. 17 (1985), 78 U.N.T.S. 277; *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 55, U.N. GAOR, 36th Sess., Supp. No. 6, at 401, U.N. Doc. A/36/6 (1981); *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, art. 2, U.N. Doc. A/810 (1948).

43. Lenaerts, *supra* note 21, at 238.

44. Some scholars believe that federalism need not be defined in territorial terms. For example, in Lebanon, "federalism" is based on a grant of the right to democratic participation in the government to major religious groups. However, this definition is unusual. See Antoine Nasri Messarra, *Principe de territorialité et principe de personnalité en fédéralisme comparé* [Principle of Territoriality and Principle of Personality in Comparative Federalism], in *FEDERALISM AND DECENTRALIZATION*, *supra* note 20, at 447-80.

45. A federation's vertical axis includes all of the laws, rules, and principles that regulate relations between the federation and its component entities.

46. A federation's horizontal axis is defined by the legal, political, and economic relations among the entities comprising the federation.

ble.⁴⁷ Therefore, a stable horizontal axis requires friendly and cooperative relations between the component entities, as well as a willingness to resolve conflicts through binding conflict resolution procedures.

2. A Federation's System of Government

Federalism is commonly identified by a separation of powers between the federation and its component entities.⁴⁸ The central government's power is limited, thereby enabling the member states to exercise genuine legislative, judicial, and administrative powers independently within their own jurisdictions. Frequently, separation of powers is achieved by a constitutional delegation of limited authority from the member states to the central government. The powers not transferred remain with the member states.⁴⁹ With some exceptions, the member states have equal rights vis à vis the federal government.⁵⁰

The member states exercise their own powers by establishing legislatures, administrations, courts, and executive branches of government. These institutions make local self-government possible, and enhance opportunities for democratic participation and control.⁵¹ As a result, federalism can greatly expand the political rights available to citizens.

The correlation between federalism on one hand, and minority and human rights on the other, is less clear.⁵² Certainly, a federal structure may provide minorities with opportunities for self-govern-

47. In Yugoslavia, old ethnic animosities that had been suppressed by the strong center suddenly re-emerged. See generally Sabrina P. Ramet, *The Breakup of Yugoslavia*, 6 GLOBAL AFF. 93 (1991).

48. See Rudolf, *supra* note 28, at 165; Higuchi, *supra* note 22, at 25; Thomas Fleiner-Gerster, *The Relationship Between Federalism and Rights*, in FEDERALISM AND DECENTRALIZATION, *supra* note 20, at 407-10.

49. See, e.g., U.S. CONST. amend. X; BUNDESVERFASSUNG [Constitution] [BV] art. 3 (Switz.). This principle is also seen in the treaties establishing the EC. See TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY] art. 3; TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 4; TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY [EURATOM TREATY] art. 3. A transfer of competence to the federation must be definite and irrevocable. It creates subordination of the component entities under the federal constitution. Otherwise, the union depends legally and politically on its constituent units, and must be regarded as a confederation. See Rudolf, *supra* note 28, at 165-66; see also Lane, *supra* note 33, at 178.

50. In Spain, the several component entities may determine for themselves the extent of local autonomy by choosing from a list of transferrable powers. See CONSTITUCION [C.E.] art. 148, § 1 (Spain).

51. See *id.*

52. See Louis Henkin, *Federalism, Decentralization and Human Rights*, in FEDERALISM AND DECENTRALIZATION, *supra* note 20, at 391-98; Fleiner-Gerster, *supra* note 48, at 407.

ment and political self-determination in their territories.⁵³ A limited and divided government, which is inherent in federalism to some extent,⁵⁴ may preserve human rights and political participation more effectively than a unitary state.⁵⁵ However, federalism also may create minority relations problems if the territorial subdivisions are ethnically-based.⁵⁶ Thus, constitutional safeguards against majoritarian decisions are necessary. In some states, the central government guarantees respect for human and minority rights in its member states.⁵⁷ However, a unitary state may be in a better position to ensure high standards and uniform enforcement of fundamental freedoms in the country as a whole.⁵⁸

3. Basic Features of Federal Constitutions

Basic legal rules and regulations are essential in establishing a stable federal system of government. The powers of the federal government and the member states should be clearly delineated to avoid

53. See Henkin, *supra* note 52, at 392. Examples include the French and Italian-speaking minorities in Switzerland, which have their own cantons and enjoy linguistic, cultural, and political autonomy.

54. See Lenaerts, *supra* note 21, at 205 ("As a system of divided powers, federalism proceeds from the very essence of constitutionalism, which is limited government operating under the rule of law.").

55. See THE FEDERALIST No. 51, at 325 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888). Alexander Hamilton wrote:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of people. The different governments will control each other, at the same time that each will be controlled by itself.

Id.

56. See Law of the Union of the Soviet Socialist Republics on Increasing Liability for Encroachment on the National Equality of Citizens and for the Forcible Violation of the Unity of the USSR Territory, reprinted in CURRENT DIG. SOVIET PRESS, Apr. 2, 1990, at 1 (law designed to prevent marginalization of minorities in the Soviet republics).

57. For example, in Switzerland, the Swiss Federal Court hears all cases arising in the cantons that allege that an act by a canton violates the constitution. The Swiss Federal Court, however, may not decide whether federal acts violate the constitution. See BV art. 113, § 3. Judicial review is thus limited to acts by the cantons. The democratic legitimacy of federal legislation, which is subject to mandatory referendum, prevails over respect for human rights. Therefore, the Swiss Federal Court could not have decided *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), as did the United States Supreme Court. On the federal level, the Swiss constitutional system provides only for political and democratic safeguards of human rights. See Lenaerts, *supra* note 21, at 235-37.

58. See Henkin, *supra* note 52, at 391.

power conflicts. The federal constitution is an appropriate instrument for addressing the issue of power conflicts, as it establishes and legitimizes a system of government. Thus, to a certain extent, federalism, constitutionalism, and the rule of law are inseparable.⁵⁹

The constitution must delineate the jurisdiction of both the union and the member states. A common but not indispensable solution is to transfer limited authority to the center, while allowing the member states to retain all other powers.⁶⁰ The constitution must further provide for either legal or political procedures, or both, in order to produce clear and binding resolutions⁶¹ to vertical and horizontal power disputes.⁶² Resolution of these issues demands comprehensive substantive regulation of both the vertical and horizontal power structures by domestic law. This includes regulating member state participation in the federal government, particularly in the legislative process.⁶³ Such regulation affords the component entities an opportunity to preserve their autonomy in both the political and constitu-

59. See Lenaerts, *supra* note 21, at 205-07.

60. This is the concept of enumeration of federal powers, which is embodied in the United States Constitution. See U.S. CONST. amend. X; see also *supra* note 22 (setting forth the text of the Tenth Amendment). One commentator has noted:

The government of the United States is one of enumerated powers; the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the constitution[s] of the several States, which are not grants of power to the States, but which apportion and impose restrictions upon powers which the States inherently possess

Lenaerts, *supra* note 21, at 205 n.2 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 9-10 (1868)).

Constitutions in other countries enumerate the states' powers and assign all others to the center. This is particularly true for countries opting for so-called devolutionary federalism. See Lenaerts, *supra* note 21, at 237-40.

61. Federal systems are characterized by frequent disputes between the central authority and member states over constitutional interpretation, the vertical separation of power, the extent of local government powers, and related problems. See Stephan Kux, *Soviet Federalism, PROBS. OF COMMUNISM*, Mar.-Apr. 1990, at 17.

62. See U.S. CONST. art. III, § 2, cl. 1; BV art. 113, § 1 (Switz.). Both provide for judicial resolution of conflicts between the federal government and the states or cantons.

63. For instance, in Switzerland, the United States, and Germany, the federal legislature is bicameral, with one chamber representing the member states as states. BV arts. 71, 80 (Switz.); U.S. CONST. art. I, §§ 1, 3; GRUNDGESETZ [Constitution] [GG] arts. 50, 71 (F.R.G.). The EC has established an elaborate system of member state participation in the decision making process. Its framework of vertical and horizontal division of power often requires unanimity or a super-majority of the member states. See EEC TREATY arts. 100, 100A, 148, 149, 235. As a basic rule, member state participation increases when the powers granted to the community are less specific. Lenaerts, *supra* note 21, at 214.

tional amendment processes.⁶⁴

The constitution is the country's supreme law, binding both the federal and member states' governments. Because the federal constitution provides the legal basis to settle center-periphery problems, it serves as a stabilizing influence. In addition, the constitution provides a fundamental legal safeguard because it restrains the central government from usurping the powers of the member states, while according the center the power necessary to govern the country. The constitution also establishes political and legal procedures that enable the federation to function smoothly. Moreover, the constitution gives the federation authority to create rules of law within its sphere of competence. To do this, the federation must be vested with what German legal scholars call *Kompetenzkompetenz*, or the supreme authority to allocate the decision making power in a country.⁶⁵ If the constitution lacked supremacy, it would undermine the constitutionally created political and legal balance. As a result, the power structure, which is the "equilibrium" of the federal constitution, inevitably would fall apart.

4. The Federation as a State

The world community recognizes federal states as sovereign and independent legal bodies, enjoying all of the rights and duties of international law.⁶⁶ Federal states enjoy all of the attributes of statehood,⁶⁷ and their foreign relations are governed by international law.⁶⁸ Because a federation pursues a unified and comprehensive state purpose, and has authority to address all domestic problems, it is a single political entity under international law.⁶⁹ The world commu-

64. Article V of the United States Constitution requires ratification by three-fourths of the state legislatures, while article 123 of the Swiss constitution requires a majority vote by the cantons and the population. See U.S. CONST. art. V; BV art. 123.

65. See Lane, *supra* note 33, at 179.

66. *Id.*

67. These attributes are (1) a defined territory; (2) a permanent population; (3) a government controlling its population and territory; and (4) the engagement in, or the capacity to engage in, international relations. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987); see also Rudolf, *supra* note 28, at 165.

68. Federal states are represented by a federal government that controls territory, population, and foreign affairs. Usually, member states lack external sovereignty and independence because their powers and goals are limited by domestic law. Therefore, they are usually excluded from acting in the international arena. See, e.g., U.S. CONST. art. II, § 2 (vesting treaty making power in the federal government). But see *infra* notes 82-86 and accompanying text.

69. International law traditionally has considered the division of power within a federation to be a purely municipal matter. Lane, *supra* note 33, at 178.

nity, therefore, traditionally has relied on the federal government as a country's sole legal representative,⁷⁰ and has held the entire federal state responsible for fulfilling treaty obligations, irrespective of internal divisions of power.⁷¹

Under international law, the various political divisions within a federation are governed by its constitution,⁷² and are therefore of internal significance only.⁷³ According to international law, as long as the constitution addresses all aspects of vertical and horizontal power sharing, it creates a fully sovereign entity.⁷⁴ Limited political and legal cooperation among a federation's member states⁷⁵ does not affect the character of a federation adversely, so long as the federal constitution regulates and controls such cooperation in a manner that protects the federation against likely destabilizing effects.⁷⁶

A federation may also originate from a treaty governed by international law, which codifies a detailed compact between merging member states. By concluding such a treaty and subsequently adopting a constitution, the member states generally surrender their exter-

70. *Id.*

71. See Vienna Convention on the Law of Treaties, May 23, 1969, S. EXEC. DOC. L., 92d Cong., 1st Sess. art. 27 (1982), 1155 U.N.T.S. 331, *reprinted in* 63 AM. J. INT'L L. 875 (1969). Exceptions to this rule may be made (1) expressly in a treaty; (2) by making a reservation to a treaty; or (3) by invoking article 46 of the Vienna Convention on the Law of Treaties, if the treaty has been concluded in obvious violation of the constitutional provisions governing treaty making power. See *id.* art. 46; Lane, *supra* note 33, at 180.

72. International law may be applied by analogy within a federation to resolve a problem between member states where the constitution does not provide a legal rule. See Josef L. Kunz, *International Law by Analogy*, 45 AM. J. INT'L L. 329, 332 (1951). In such cases, international law is applied as part of the domestic law.

73. Article 46 of the Vienna Convention on the Law of Treaties provides an exception. See *supra* note 71 and accompanying text.

74. ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT—THEORIE UND PRAXIS* [UNIVERSAL PUBLIC INTERNATIONAL LAW THEORY AND PRACTICE] § 945 (3d ed. 1984).

75. *E.g.*, BV art. 7 (Switz.); U.S. CONST. art. I, § 10.

76. Section 1 of article 7 of the Swiss constitution prohibits "political" agreements and compacts between cantons. It also limits agreements between cantons on legislative, judicial, and administrative matters. Furthermore, such compacts require the federal government's consent. This consent is given when the supremacy of the federal laws is not affected. See BV art. 7, § 1. The United States Constitution provides a similar regulation, stating that "[n]o state shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." U.S. CONST. art. I, § 10, cl. 3. This clause is directed at the formation of alliances "which may tend to increase and build up the political influence of the contracting States so as to encroach upon or impair the supremacy of the United States." *Virginia v. Tennessee*, 148 U.S. 503 (1893); see also GERALD GUNTHER, *CONSTITUTIONAL LAW* 335 (11th ed. 1985).

nal sovereignty⁷⁷ and establish a legal and political superstructure with independent authority and sovereignty.⁷⁸ The treaty typically becomes insignificant once the member states ratify the constitution. Additionally, international law no longer applies to internal relations.⁷⁹ Any modification in the relationship between member states, or between the federation and member states, requires either a formal constitutional amendment or federal legislation.⁸⁰ The mere fact that a federation is originally based upon a treaty has no impact on its legal nature as a single state once the member states merge.⁸¹

5. Member States of Federations as Subjects of International Law

Legal scholars are divided as to whether member states of federations have the legal capacity to be subjects of international law. States no longer strictly follow the traditional doctrine that a federation's creation excludes any international activity by its member states.⁸² In addition, it is widely recognized that a federation may enable its member states to act within the sphere of international law.⁸³ Some federations, such as the Federal Republic of Germany, Switzerland, and the United States, even grant their component entities the authority to make treaties, but this power is narrow in scope and may only be exercised under the strict supervision of the federal government.⁸⁴ In these cases, the member states exercise only those powers that the

77. See, e.g., *Vienna Convention on Succession of States in Respect of Treaties*, 32d Sess., arts. 30-31, U.N. Doc. A/Conf. 80/31 (1978) [hereinafter *Convention on Treaty Succession*], reprinted in 72 AM. J. INT'L L. 971 (1978).

78. Such a compact appears to be a logical step in creating a federation composed of formerly independent and sovereign states. In practice, however, such a compact is rarely made.

79. To the extent the compact is designed to play a major legal role, it forms part of the country's constitutional framework. International law governs by analogy. See VERDROSS & SIMMA, *supra* note 74, § 945; see also *supra* note 72.

80. The compact may play a limited role in supplementing the constitution. Federal constitutions often allow member states to conclude compacts if the supremacy of federal legislation is maintained.

81. See MURRAY FORSYTH, *UNIONS OF STATES—THE THEORY AND PRACTICE OF CONFEDERATION* 2-3 (1981) (contending that a full-fledged federal state is a state and not a contractual union of states, even if it was originally based on a treaty).

82. See Lane, *supra* note 33, at 178-80; see also CRAWFORD, *supra* note 14, at 293-94.

83. VERDROSS & SIMMA, *supra* note 74, § 678; Rudolf, *supra* note 28, at 169; CRAWFORD, *supra* note 14, at 293-94.

84. See GG art. 32, § 3 (F.R.G.); BV art. 9 (Switz.) (a canton may conclude treaties with adjacent states on economic, penal, and traffic matters), 10 (the Swiss government checks for conformity with federal legislation and acts as an intermediary); U.S. CONST. art. I, § 10, cl. 3 (the treaty making power of the individual states is dependent upon the consent of Congress); see also LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 521-28 (1988).

center delegates to them.⁸⁵ Because only the federal constitution may authorize member states of federations to enter into agreements with foreign states,⁸⁶ the component entities do not exercise independent powers. Therefore, the member states of a federation cannot be regarded as subjects of international law.

D. Common Features of Confederations

The distinction between federations and confederations in international law is significant because it determines such matters as membership in international organizations, standing before the International Court of Justice, international liability, treaty making power, and other crucial international issues.⁸⁷ Yet, in reality, the distinction is sometimes difficult to make. One reason may be that the two types of entities share a common purpose: to create unity in the midst of diversity among component members. Professor Pierre Pescatore, a former judge of the European Court of Justice, explains this as follows:

It would . . . seem that federalism is a political and legal philosophy which adapts itself to all political contexts on both the municipal and international level, wherever and whenever two basic prerequisites are fulfilled: the search for unity, combined with genuine respect for the autonomy and the legitimate interests of the participant entities.⁸⁸

Despite these similarities, there are fundamental differences between the chosen methodologies of federations and confederations.⁸⁹

First, states join a confederation for limited and sometimes temporary purposes, such as common defense and conduct of foreign affairs. On the other hand, a federation has a universal state purpose, which both the federal government and the component states carry

85. See VERDROSS & SIMMA, *supra* note 74, § 395.

86. The International Law Commission's proposal to include this rule in the Treaty on the Law of Treaties was deleted in the final stage of negotiations. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 403 (2d ed. 1986).

87. See Felix Ermacora, *Confederations and Other Unions of States*, in 10 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 28, at 60, 61; see also CRAWFORD, *supra* note 14, at 288-97; FORSYTH, *supra* note 81.

88. Pierre Pescatore, *Foreword to COURTS AND FREE MARKETS* (Terrance Sandaloro & Eric Stein eds., 1982).

89. The main difference is that component entities of a confederation remain full subjects of international law. See *infra* notes 96-98 and accompanying text. However, the terminology used is often imprecise, and federations are often labeled as confederations. For example, although Switzerland is actually a federation its official name translated into English means Swiss Confederation. For a discussion of this terminology, see Ermacora, *supra* note 87, at 61.

out.⁹⁰

Second, the member states form a confederation through a multi-lateral treaty that is governed by international law and remains the basic legal instrument of association.⁹¹ In contrast, a federation is usually based on a constitution.⁹² A confederation does not require a constitution since it does not carry out comprehensive goals, and, therefore, does not require the establishment of an elaborate system of government.⁹³ Even where common organizational facilities and formal decision making procedures have been established, relations among member states, and between the confederation and member states, remain governed by international law, because the compact only regulates some of these relations.

Third, a federation necessarily establishes a new legal system, whereas a confederation often does not. Legislation and administration usually are not part of a confederation's activities.⁹⁴ A confeder-

90. See VERDROSS & SIMMA, *supra* note 74, § 945. "Universal state purpose" means that the state may address and decide all political issues arising within the country. The purpose of international organizations and federations may be comprehensive as well, as articles 1 and 2 of the United Nations Charter show. See U.N. CHARTER arts. 1, 2. Some scholars consider the world community, as a whole, to be a confederation. Ermacora, *supra* note 87, at 60 (discussing G. Jellinek, *Die Lehre von den Staatenverbindungen* (1882), one of the first comprehensive studies of the systems of federations and confederations); see also FORSYTH, *supra* note 81, at 2-3. However, neither the United Nations nor the world community are states.

91. See Ermacora, *supra* note 87, at 61 (stating that "it is obvious that any new form of a confederation must be based on an international treaty"); see also FORSYTH, *supra* note 81, at 188-203.

92. A special case is the EC, whose existence rests on three treaties: (1) the Treaty Establishing the European Coal and Steel Community, signed in Paris on April 18, 1951; (2) the Treaty Establishing the European Economic Community, signed in Rome on March 25, 1957; and (3) the Treaty Establishing the European Atomic Energy Community, signed in Rome on March 25, 1957. See ECSC TREATY; EEC TREATY; EURATOM TREATY; see also Lenaerts, *supra* note 21, at 207 n.8. These treaties, however, increasingly have become similar in nature to a constitution. This process has been furthered by the European Court of Justice's concept of direct application and effect of most of the important treaty provisions. See *id.* at 208-10; Francis G. Jacobs, *European Communities*, in 6 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 28, at 124.

93. The EC's system of government consists of the Council, Commission, European Parliament, and Court of Justice of the European Communities. Jacobs, *supra* note 92, at 126-28. Balance of power and institutional equilibrium are the ideals of the European Court of Justice. See Case 9/56, *Meroni v. High Auth.*, 1958 E.C.R. 129, 152 (making an early reference to the internal balance of power policy). To review the impact of the Single European Act, 1987 O.J. (L 169) 1, on the institutional balance within the EC, see Bermann, *supra* note 21, at 567-68.

94. THE FEDERALIST No. 15, *supra* note 55, at 88 (Alexander Hamilton) (criticizing the lack of any legislation directly applicable to individuals under the Articles of Confederation, and stating that "[g]overnment implies the power of making laws"). A confederation lacks legislative and administrative powers. See Ermacora, *supra* note 87, at 61. The EC, if considered a confederation, is an exception to this rule. According to the Court of Justice of the

ation's acts usually are not self-executing, and must therefore be incorporated into the member states' statutes to have legal effect. Thus, members of a confederation retain both domestic and international sovereignty in their legislation. Member states may enact laws in areas not covered by the treaty founding the confederation. In addition, they may enter into treaties among themselves and with other countries in all matters not regulated by the founding treaty.⁹⁵

In theory, the major distinction between a federation and a confederation is sovereignty, as sovereignty is the decisive criterion for determining a state's existence in the world community.⁹⁶ In a confederation, the members retain their capacity to act as sovereign entities.⁹⁷ Thus, according to international law they continue to be states, while in a federation they merge to form a new state. As a legal entity, a confederation lacks genuine sovereignty—independent power—due to its complete dependence on the will of its sovereign member states, which are free in all other aspects, including that of determining the future of the confederation.⁹⁸

A confederation cannot be regarded as a state, in light of (1) the confederation's limited goals, entailing the absence of a universal state purpose; (2) the absence of a genuine legal system; (3) the absence of genuine decision making power, sovereignty, and legitimacy; and (4) the prevailing test of sovereignty under international law. A confederation is an alliance, league, and association, governed by international law and composed of independent states. It has no supremacy because it lacks sovereignty. Therefore, a confederation does not alter

European Communities, the treaties establishing the EC created its own legal system, which became an integral part of the legal systems of the member states. See Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585; see also Francesco Capotorti, *European Communities: Community Law and Municipal Law*, in 6 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 28, at 129.

95. This was one of Alexander Hamilton's criticisms of a confederation. See *THE FEDERALIST* No. 15, *supra* note 55, at 89-90.

96. See Ermacora, *supra* note 87, at 61.

97. Hamilton described a confederation as follows:

There is nothing absurd or impracticable in the idea of a league or alliance between independent nations for certain defined purposes precisely stated in a treaty regulating all the details of time, place, circumstance, and quantity; leaving nothing to future discretion; and depending for its execution on the good faith of the parties. Compacts of this kind exist among all civilized nations

THE FEDERALIST No. 15, *supra* note 55, at 87 (Alexander Hamilton).

98. Member states may, in accordance with treaty provisions or principles of international law, withdraw from or dissolve a confederation. In a federation, the central government alone can make this decision, and only in accordance with formal constitutional procedure. See Ermacora, *supra* note 87, at 61.

the legal character of the member states or the relations among them. The members of a confederation remain independent, full-fledged states in the world community. In contrast, since a federation is considered a state, domestic law replaces international law. As a result, a federation's component entities cease to be members of the international community.⁹⁹

The distinction between federations and confederations is crucial, since the world community and international law treat the two legal entities differently. If the distinction between federations and confederations becomes blurred, the international community cannot deal effectively with an entity that has both federative and confederative features.

III. THE PAST: FEDERALISM AS UNDERSTOOD IN THE SOVIET UNION

A. *Leninist and Stalinist Conceptions of Federalism*

An historical inquiry into the Soviet Union reveals that territorial entities had little opportunity to influence or even express their views on the territorial and political shape of their country. A tradition of Western federalism or decentralization was absent in the Russian Empire, as well as in the Soviet Union. Also, the concepts of the rule of law, constitutionalism, separation of powers, democracy, and limited government were entirely foreign.

Despite its multiethnic composition,¹⁰⁰ the Tsarist Empire was a unitary state, with all power concentrated in the hands of an autocratic tsar who personified Russia's unity.¹⁰¹ A centralized bureaucracy dominated by the Great Russians administered the entire

99. With the exception of the CIS, confederations exist only as historic relics. Former confederations, such as Switzerland, the United States, and Germany, merged to become federations. Others, such as the Austro-Hungarian Empire, were dissolved. Direct diplomacy and intergovernmental cooperation may serve the same goals as treaty-based confederations, and are often preferred because they preserve the states' autonomy. Furthermore, international and regional organizations, established since the end of the 19th century, have largely replaced alliances and associations. These organizations are better suited to be instruments of international and regional cooperation in politics, economics, and defense matters. See generally Ermacora, *supra* note 87.

100. The Russian Empire consisted of almost 200 ethnic groups at the end of the 19th century. Gleason, *supra* note 5, at 24.

101. "The Emperor of all the Russians wields the supreme autocratic power. To obey his authority, not only through fear but for the sake of conscience, is ordered by God himself." Ludwowski, *supra* note 3, at 126 (quoting The Fundamental Laws of the Russian Empire of May 6, 1906, art. 4, reprinted in II MODERN CONSTITUTIONS 182-95 (Walter F. Dodd ed., 1909)).

empire.¹⁰² The Communists also disfavored federalism,¹⁰³ because they regarded ethnic problems as manifestations of economically rooted class conflicts, which were certain to vanish in an advanced socialist society.¹⁰⁴ They preferred large multinational unitary states for ideological, political, and economic reasons. The Communists believed that only a highly centralized form of government within a large socialist state could guarantee the survival of a revolutionary power in the hostile capitalist world.¹⁰⁵ Despite the perceived need for unity of the proletariat of all nations, the first Russian Communist party program in 1903 advocated the right of self-determination for the nations of the Russian Empire.¹⁰⁶ Within the concept of self-determination, Lenin envisioned a right of the Russian Empire minorities to secede. Although Lenin did not favor secession, he considered the right to secede a prerequisite to a free and voluntary association among nationalities, distinct from the tsarist "prison of nations."¹⁰⁷ Accordingly, the Soviet multinational association was based upon an agreement among equal partners—a treaty that Lenin considered characteristic of a federation. Lenin believed that only a treaty embodying the sovereign will of all nationalities could reconcile self-determination with the transfer of power to a higher entity.¹⁰⁸

Under Lenin's concept, the legal effects of the treaty establishing a federation were ambiguous. Although the parties designed the treaty to merge several nationalities into a new state, the treaty was to continue operating even after the merger in order to provide a legal basis for secession by a member state. However, this legal basis for secession did not mean that a member state could exercise such a right at will. The legitimacy of a socialist federation was primarily based upon the Marxist-Leninist ideology and its accompanying theory of inevitable historical processes, not on the member states' will to

102. The sole exception was the Grand Duchy of Finland. See JOHN N. HAZARD, *THE SOVIET SYSTEM OF GOVERNMENT* 94 (5th ed. 1980).

103. In 1913, Lenin declared, "Marxists will never, under any circumstances, advocate either the federal principle or decentralization. The great centralized state is a tremendous historical step forward . . ." ARYEH L. UNGER, *CONSTITUTIONAL DEVELOPMENT IN THE USSR, A GUIDE TO THE SOVIET CONSTITUTIONS* 47 (1981) (quoting V.I. LENIN, 20 COLLECTED WORKS 411).

104. See Gleason, *supra* note 5, at 25-26; UNGER, *supra* note 103, at 47-48; HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 359 (1990).

105. UNGER, *supra* note 103, at 47.

106. *Id.* at 46; see also HANNUM, *supra* note 104, at 32-33.

107. UNGER, *supra* note 103, at 46.

108. *Id.* at 46-47.

adhere. Marxist-Leninists subordinated the right of self-determination and, thus, the right to secede to the class struggle.¹⁰⁹ Federalism was considered only a necessary transition en route to the unification of the laborers of all nations.¹¹⁰ When viewed from this perspective, it remains unclear whether the right to secede had any substance.¹¹¹

Lenin developed this concept of federalism with an aim toward winning support for his revolutionary cause among the numerous ethnic minorities in Russia.¹¹² His concept of federalism provided little guidance regarding the exercise of socialist power and the development of governmental and administrative structures. Instead, political and economic considerations dominated these structures. This lack of guidance later manifested itself in Stalin's attitude toward federalism.

By 1917, Stalin had become the Communist party's principal spokesperson on national minority questions.¹¹³ Stalin had no intention of dissolving the political and economic ties that the tsarist government had created to give minorities more freedom.¹¹⁴ Rather, he advocated limited decentralization for purely local questions, while maintaining centralized control over important fundamental mat-

109. Stalin made this point very clear at the 12th Party Congress in April 1923:

There are cases when the right of self-determination conflicts with another, a higher right—the right of the working class that has come to power to consolidate its power. In such case—this must be said bluntly—the right of self-determination cannot and must not serve as an obstacle to the working class in exercising its right to dictatorship.

William C. Hodge, *Federalism and the Soviet Constitution of 1977: Commonwealth Perspectives*, 55 WASH. L. REV. 505, 528 (1980) (quoting JOSEF STALIN, 5 SOCHINENIYA [WORKS] 264-65 (1947), translated in SOVIET NATIONALITIES POLICY IN PRACTICE 35-36, 40 (Robert Conquest ed., 1967)).

110. Gleason, *supra* note 5, at 26-27. Lenin wrote:

The right of nations to self-determination implies exclusively the right to independence in the political sense, the right to free political separation from the oppressor nation. Specifically, this demand for political democracy implies complete freedom to agitate for secession and for the decision on secession to be made by a referendum of the seceding nation. This demand, therefore, is not the equivalent of a demand for separation, fragmentation and the formation of small states. It implies only a consistent expression of struggle against all national oppression.

HANNUM, *supra* note 104, at 32 (quoting V.I. LENIN, QUESTIONS OF NATIONAL POLICY AND PROLETARIAN INTERNATIONALISM 138-39 (Moscow: Foreign Languages Publishing House, n.d.)).

111. HANNUM, *supra* note 104, at 32-33.

112. Gleason, *supra* note 5, at 27; HAZARD, *supra* note 102, at 95-97; HANNUM, *supra* note 104, at 33.

113. UNGER, *supra* note 103, at 47.

114. *See id.*

ters.¹¹⁵ In fact, Stalin openly opposed the independence of non-Russian nationalities.¹¹⁶

In sum, socialist federalism had little in common with the traditional concept of federalism. Moreover, this brand of socialism was both ambiguous and contradictory. It claimed to reconcile self-determination and local autonomy with the incompatible desire for a highly centralized socialist state. Although socialist federalism advocated the right to secede, it allowed the Communist party and the centrally planned and administered economy to suppress secession.¹¹⁷ As it later became clear, this system neither granted real powers to the nationalities, nor abandoned its autocratic tsarist past.¹¹⁸

B. *The Dismemberment of the Unitary Tsarist State*

The 1917 revolution demonstrated that the Russian Empire's tsarist unitary structure was anachronistic and ill-founded. As tsarist rule broke down in the wake of the 1917 revolution, former provinces, cities, and even villages declared their independence and empowered local Soviets to govern.¹¹⁹ As a result, the entire Tsarist Empire disintegrated into several sovereign entities. Poland, the Baltic states, and Finland established complete independence via this process. In contrast, other territories formed Soviet republics based on their right of self-determination.¹²⁰ These declarations resembled the declarations made in the Soviet Union in 1989 and 1990.

Soviet Communists welcomed this process of local and regional self-determination, and assisted in establishing independent Soviet republics, despite the resultant disruption of the former Russian Empire. The most important of these republics, the Communist-dominated RSFSR, recognized the other republics' rights of self-de-

115. *Id.*

116. "The so-called independence of so-called Georgia, Armenia, Poland, Finland, etc., is only an illusion, and conceals the utter dependence of these apologies for States on one or another group of imperialists." Hodge, *supra* note 109, at 527 (quoting Josef Stalin, *The Policy of Soviet Power Regarding the National Question in Russia*, PRAVDA, Oct. 10, 1920, translated in SOVIET NATIONALITIES POLICY IN PRACTICE, *supra* note 109, at 23); see also HANNUM, *supra* note 104, at 33.

117. See Gleason, *supra* note 5, at 27.

118. Some scholars believe that the 1917 Bolshevik seizure of power was nothing more than a restoration of the ancient regime under the leadership of socialism. See generally Jacob E. Heilbrunn, *Stalin the True Leninist*, 6 GLOBAL AFF. 132 (1991); see also Ludwikowski, *supra* note 3, at 124-28.

119. See John N. Hazard, *Soviet Republics in International Law*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 28, at 418-19; HANNUM, *supra* note 104, at 359.

120. Hazard, *supra* note 119, at 418-19; HANNUM, *supra* note 104, at 359.

termination and dealt with their various governments as sovereign equals.¹²¹ In addition, the RSFSR acknowledged the independence of Finland and the three Baltic states.¹²²

The 1918 constitution of the RSFSR was the first attempt to reunify the country in the wake of the 1917 revolution. This constitution proposed a centralized government¹²³ on an ostensibly federal basis.¹²⁴ Articles 11 and 12 of the constitution regulated the formation of autonomous regions, which could join the RSFSR as members of the federation.¹²⁵ However, the constitution failed to define the federal character and the extent of local autonomy.¹²⁶ The Communist drafters inserted federalist language into the constitution merely to placate national minorities and to provide a legal basis for independent territories to join the RSFSR. Typical of a Marxist socialist constitution, the 1918 RSFSR constitution was more of a propaganda device than a legal document.¹²⁷ The Bolsheviks' main goal was to establish a strong and highly centralized government that would entrench socialism, fight class enemies, and defend against foreign invasion.¹²⁸ Thus, the Communist leaders sought neither a sepa-

121. See generally USSR: SIXTY YEARS, *supra* note 2. The Third All-Russia Congress of the Soviets' adoption of its Declaration of Rights of the Working and Exploited People on January 25, 1918, exemplifies the RSFSR's respect for the other republics' right of self-determination. The declaration states:

[E]ndeavouring to create a really free and voluntary, and therefore all the more firm and stable, union of the working classes of all the nations of Russia, the Third Congress of Soviets confines its own task to setting up the fundamental principles of a federation of Soviet Republics of Russia, while leaving it to the workers and peasants of each nation to decide independently . . . whether they wish to participate in the federal government and in the other federal Soviet institutions, and on what terms.

Id. at 40.

122. The RSFSR recognized the independence of Finland on December 18, 1917, and the independence of the three Baltic states in December 1918. See Hazard, *supra* note 119, at 418.

123. Igor I. Kavass & Gary I. Christian, *The 1977 Soviet Constitution: A Historical Comparison*, 12 VAND. J. TRANSNAT'L L. 533, 548 (1979).

124. KONSTITUTSIYA [KONST.] RSFSR art. 2 (1918). Article 2 of the constitution stated that "[t]he Russian Soviet Republic is established on the basis of a free union of free nations, as a federation of Soviet national republics." *Id.*, translated in UNGER, *supra* note 103, at 25.

125. *Id.* arts. 11-12.

126. See *id.* Article 11 stated that regions with a "distinct mode of living and national composition may unite in autonomous regional unions" with their own Congresses of Soviets and executive organs. *Id.* art. 11, translated in UNGER, *supra* note 103, at 28. However, no distinct legal status for such regions was ever established. Hazard, *supra* note 119, at 418.

127. This was a general feature of Communist constitutions, which were not neutral, but "partisan." See John N. Hazard, *The Common Core of Marxian Socialist Constitutions*, 19 SAN DIEGO L. REV. 297, 299 (1982); Ziyad Motala, *The Jurisprudence of Constitutional Law: The Philosophical Origins and Differences Between the Western Liberal and Soviet Communist State Law*, 8 DICK. J. INT'L L. 225, 241-42 (1990).

128. Kavass & Christian, *supra* note 123, at 543-44.

ration of powers nor a limited and decentralized government. Instead, the Communists sought a dictatorship of the proletariat during the transitory period prior to reunification.¹²⁹ In addition, the non-Russian Soviet republics enacted transitional constitutions similar to the RSFSR constitution, some of which even referred to the goal of unification.¹³⁰

C. *The Road to Establishing the Soviet Union as a Union*

1. Contract-Based Cooperation Among the Republics: Confederative Structures

Despite the ambiguous language of the 1918 RSFSR constitution, several of the independent territories subsequently joined the RSFSR due to either Communist victories in their territories or decisions by their Communist-dominated Soviets.¹³¹ Other territories remained independent socialist republics.¹³² However, due to strong economic interdependence and foreign military intervention, it remained difficult for the territories to maintain their independence without the RSFSR's assistance. The Communist leaders in Moscow hoped to expand and consolidate their influence, and thereby establish the largest possible socialist power. In addition, Communist leaders hoped to promote the New Economic Policy, which was intended to reorganize the economy.¹³³ As a result, a system of bilateral and multilateral treaties between the RSFSR and these republics emerged, creating a Moscow-centered confederative structure.¹³⁴ Based on vital common interests and a shared ideology, the treaty system established a military and economic confederacy under the leadership of the RSFSR and the Communist party. This confederacy exercised its

129. "The fundamental aim of the Constitution of the Russian Socialist Federated Soviet Republic, designed for the present transition period, is to establish a dictatorship of the urban and rural proletariat and the poorest peasantry in the form of a powerful All-Russian Soviet Government" KONST. RFSFR art. 9 (1918), *translated in* UNGER, *supra* note 103, at 27-28.

130. The republics' constitutions are translated in USSR: SIXTY YEARS, *supra* note 2, at 69-110. Article 4 of Ukraine's constitution stated that "the Ukrainian Socialist Soviet Republic declares its firm resolution to join a United International Socialist Soviet Republic as soon as the conditions for its emergence are created." KONSTITUTSIYA [KONST.] UkSSR art. 4 (Ukraine), *translated in* USSR: SIXTY YEARS, *supra* note 2, at 89.

131. See Hazard, *supra* note 119, at 419.

132. See Kavass & Christian, *supra* note 123, at 549.

133. See HAZARD, *supra* note 102, at 139-41.

134. Kavass & Christian, *supra* note 123, at 549-50. An overview of these treaties can be found in USSR: SIXTY YEARS, *supra* note 2, at 111.

centralizing power over the other republics by influencing their governments.

Although the RSFSR was by far the most powerful republic, the independence of other republics, such as Ukraine, Georgia, Azerbaijan, and Byelorussia, was more than a mere formality. Although economically and ideologically dependent on the RSFSR, the republics retained their foreign policy and treaty making power with neighboring states, such as Turkey, Poland, and the Baltic states.¹³⁵ However, temporary unification of foreign policies under the leadership of the RSFSR took place at the Genoa and Hague conferences, where the parties concluded the Rapallo Treaty and discussed the re-establishment of friendly relations between East and West.¹³⁶ Yet, even after these conferences, the various republics continued to conduct foreign affairs and conclude treaties with foreign nations independently.¹³⁷ It was not until the conclusion of a union treaty at the end of 1922 that the republics' independent foreign policy activities ceased.

2. Conclusion of the 1922 Union Treaty

The confederative structure in existence prior to 1922 was incompatible with the economic and political aspirations of the Communist leaders in Moscow. Thus, beginning in 1921, the Communist party orchestrated a popular movement calling for the unification of the several Soviet republics in a federation. As a result, various party and republican bodies passed a series of resolutions in 1922.¹³⁸ Apparently, these bodies did not consider the constitution of the RSFSR to be an adequate legal basis for the process of unification. During 1922, the Congresses of Soviets in the RSFSR, Ukraine, White Russia,¹³⁹ and the new Transcaucasian Federation¹⁴⁰ agreed to a compact concerning the foundation of a union and the enactment of a new union constitution.¹⁴¹ On December 27, 1922, the Tenth All-Russian Congress of Soviets elected a delegation to draft a new union constitu-

135. See Hazard, *supra* note 119, at 419-20.

136. *Id.*

137. *Id.*

138. UNGER, *supra* note 103, at 45. These resolutions can be found in USSR: SIXTY YEARS, *supra* note 2, at 152-61.

139. White Russia is also known as Byelorussia. WEBSTER'S NEW INTERNATIONAL DICTIONARY 2609 (3d ed. 1986).

140. The Transcaucasian Federation consisted of Azerbaijan, Armenia, and Georgia. UNGER, *supra* note 103, at 45.

141. Kavass & Christian, *supra* note 123, at 549-51; USSR: SIXTY YEARS, *supra* note 2, at 152-57.

tion with the aid of delegates from the other republics.¹⁴² For the first time, Lenin's concept of a treaty-based federation, preserving its component entities' right of self-determination by granting them the right to secede, became a reality. This right to secede became the paramount federalist feature of all Soviet constitutions.

Three days later, on December 30, 1922, the First Congress of Soviets of the Union of Soviet Socialist Republics¹⁴³ approved the Treaty on the Formation of the Union of Soviet Socialist Republics¹⁴⁴ ("1922 Union Treaty"). The First Congress hoped "to form one federal state—the Union of Soviet Socialist Republics,"¹⁴⁵ under terms set forth in the treaty's twenty-six articles.¹⁴⁶ The formerly sovereign¹⁴⁷ RSFSR, Ukrainian SSR, Byelorussian SSR, and Transcaucasian Federation subsequently ratified the treaty.¹⁴⁸

In the declaration for unification, economic considerations were paramount: "It has proved impossible to restore the national economy as long as the republics exist separately."¹⁴⁹ The Communist concept of a highly centralized and planned economy required a strong government with comprehensive powers. The formal independence of other republics limited the policy and economic goals of the planned economy. Consequently, the declaration also stated that "[a]ll these circumstances make it imperative for the Soviet Republics to unite within a single federal state capable of ensuring both external security and internal economic advance and the freedom of ethnic development."¹⁵⁰

Despite the republics' right to secede, the 1922 Union Treaty was designed to substitute the confederative structure with a federation.

142. Section 2 of its resolution provided for unification "based on the principle of voluntary accession and equal rights of the republics, each of them reserving the right of free secession from the Union of Republics." Resolution of the Tenth All-Russian Congress of Soviets, *translated in USSR: SIXTY YEARS*, *supra* note 2, at 160.

143. The Tenth All-Russian Congress became the First Congress of Soviets of the Union of Soviet Socialist Republics during the process of unification. HAZARD, *supra* note 102, at 92-98.

144. *Postanovleniya pervogo Syezda Sovietov Soyuz Sovetskikh Sotsialisticheskikh Republik* [Treaty on the Formation of the Union of Soviet Socialist Republics] 4-7 (1923) [hereinafter 1922 Union Treaty], *translated in USSR: SIXTY YEARS*, *supra* note 2, at 164-68.

145. *Id.*

146. These articles formed the basic structure of the future constitution, allocated powers between the union and republics, and guaranteed each republic the freedom to secede. See 1922 Union Treaty, *supra* note 144, art. 26.

147. See UNGER, *supra* note 103, at 49.

148. See 1922 Union Treaty, *supra* note 144, pmbl.

149. *Id.*, *translated in USSR: SIXTY YEARS*, *supra* note 2, at 163.

150. *Id.*

This entailed (1) a true shift in the *Grundnorm*,¹⁵¹ with the *Kompetenzkompetenz*¹⁵² being transferred to the new union;¹⁵³ (2) the extinction of the republics' international legal personality; (3) the transfer of power from the republics to the union government; (4) the creation of a new state possessing all rights and duties under international law; and (5) the existence of a model for a union constitution. A unitary state probably would have better served the comprehensive political and economic goals of the Communists. However, there was considerable disagreement among the Communist leaders of the republics regarding the proper state structure and the future influence of the republics' nationalities and minorities.¹⁵⁴ Moreover, Lenin and Stalin could not contradict their own concept of socialist federalism by imposing a unitary structure on the Soviet Empire without losing credibility. Thus, although the concept of socialist federalism was advocated primarily for its propaganda value, it also helped the non-Russian republics prevent the establishment of a formal unitary state. As a result, the center in Moscow conceded a formal federal system of government and a right of secession to the republics.

Interestingly, the 1922 Union Treaty provided an amendment procedure.¹⁵⁵ The inclusion of this amendment procedure indicated that the treaty would play a continuing role in the union's legal foundation, and that it was not merely a merger treaty. Therefore, federalism in the Soviet Union was based on both a union treaty and a constitution founded upon that treaty. This dual structure formed part of the legacy and tradition of socialist federalism, even though

151. *Grundnorm* means "basic norm," and in the terminology of Hans Kelsen's legal theory, it refers to the basic norm from which the existence of any law necessarily emanates. Lane, *supra* note 33, at 180.

152. See *supra* text accompanying note 65; see also Lane, *supra* note 33, at 179.

153. Lane, *supra* note 33, at 180.

154. The Ukrainian Communist party resisted formation of a unitary state, instead advocating republican sovereignty and autonomy. This caused Stalin to remark:

I perceive from the insistence of several Ukrainian comrades their desire to define the Union as something between a confederation and federation, with the preponderant weight on the side of confederation. . . . We are constructing, not a confederation, but a federal republic, one union state, uniting military and foreign affairs, foreign trade, and other matters.

Kavass & Christian, *supra* note 123, at 550 (quoting the Fourth Conference of the Central Committee RCP(b) with Officials of the National Republics and Oblasts, Concluding Remarks of Josef Stalin (June 12, 1923)).

155. See 1922 Union Treaty, *supra* note 144, art. 25 (providing that the "[a]pproval of, amendment and addenda to the Treaty of Union shall be the exclusive prerogative of the Congress of Soviets of the Union of Soviet Socialist Republics"), translated in USSR: SIXTY YEARS, *supra* note 2, at 168.

the treaty did not impact subsequent constitutional developments in the Soviet Union. However, the survival of this dual structure was apparent in President Gorbachev's attempts to base a renewed union on both a new treaty *and* a new constitution.¹⁵⁶

D. Constitutional Developments from 1924 to 1977

1. The Union Constitution of 1924

The Second All-Union Congress of Soviets ratified the 1924 Constitution on January 31, 1924, just ten days after Lenin's death.¹⁵⁷ The 1924 Constitution set forth the provisions of the 1922 Union Treaty in detail. For instance, the constitution's preamble described the republics' position within the federation in propagandistic terms:

The will of the peoples of the Soviet republics, unanimously proclaimed at their recent congresses of soviets in the decision to form the "Union of Soviet Socialist Republics," is a sure guarantee that this Union is a voluntary association of peoples with equal rights, that each republic is assured of the right of free secession from the Union¹⁵⁸

Article 4 of the constitution, which guaranteed the right of secession, could not be amended, limited, or repealed without the prior consent of all of the republics.¹⁵⁹ In practice, however, the system of government resembled that of a unitary state more than a federation.¹⁶⁰ Nonetheless, federalism did have some impact, as important areas of legislation and administration fell within the republics' jurisdiction.¹⁶¹ However, while the 1924 Constitution gave comprehensive political and economic powers to the union,¹⁶² it failed to provide efficient safeguards for republic autonomy. Due to the complicated scheme of delegating power within the union government, it was easy to override the formal prerogatives of the legislature and the republics.

156. See *infra* note 210.

157. Kavass & Christian, *supra* note 123, at 550.

158. KONSTITUTSIYA [KONST.] SSSR pmb. (1924), translated in UNGER, *supra* note 103, at 60.

159. See *id.* arts. 4, 6.

160. See HANNUM, *supra* note 104, at 359.

161. See *id.* at 360; Peter H. Solomon, Jr., *The U.S.S.R. Supreme Court: History, Role, and Future Prospects*, 38 AM. J. COMP. L. 127, 128 (1990).

162. See KONST. SSSR art. 1 (1924) (granting the union power over foreign affairs, the military, domestic and foreign trade, national economic planning, distribution of land, and natural resources).

The potential for democratic participation by the republics was small. Formally, the highest powers belonged to the Supreme Soviet, with the bicameral Central Executive Committee of the USSR¹⁶³ exercising these powers in interim sessions. In reality, however, the Presidium was in control whenever the Central Executive Committee was not in session.¹⁶⁴ Thus, the political influence of the Supreme Soviet, as well as that of the Central Executive Committee, was reduced. Consequently, the republics were excluded from political participation to a large degree.

The republics also confronted a very powerful center with virtually no separation of powers. No binding legal procedures existed to protect the republics' autonomy.¹⁶⁵ Even though the 1924 Constitution vested the USSR Supreme Court with the power of constitutional review, it could only render advisory opinions regarding the legality of central agencies' administrative orders.¹⁶⁶ In contrast, the union enjoyed the power to annul any decision of the republics that violated the constitution.¹⁶⁷ Thus, no independent judiciary existed to effectively oversee the constitutional balance of powers between the union and the republics.¹⁶⁸ Absent effective judicial and political control over the center, and given the Communist party's all-embracing influence, the republics had no means of protecting their autonomy within the framework of the 1924 Constitution.

2. The Union Constitution of 1936

The 1936 Constitution, which remained in force until 1977, did not alter the basic practical features of socialist federalism. The drafters of the 1936 Constitution intended to bring "further democratization" and enhance the basis for socio-economic changes following the consolidation of Stalin's dictatorship and the Communist party's position.¹⁶⁹ The 1936 Constitution granted the right of secession, but it

163. The Central Executive Committee consisted of the Union Council and the Council of Nationalities. *Id.* art. 8.

164. *Id.* art. 29.

165. The 1924 Constitution did not empower the supreme court to decide the constitutionality of union legislation. See Kavass & Christian, *supra* note 123, at 552. Rather, the central executive committees of the republics could only protest portions of the union's administrative orders and decrees to the Presidium. See KONST. SSSR art. 42 (1924).

166. Solomon, *supra* note 161, at 128.

167. KONST. SSSR art. 1 (1924).

168. See Solomon, *supra* note 161, at 128. Additionally, judges often were partisans of the Communist party and therefore subject to party discipline. See *id.*

169. UNGER, *supra* note 103, at 80; Kavass & Christian, *supra* note 123, at 553-56.

abolished the amendment procedure that existed under the 1924 Constitution.¹⁷⁰ It also allowed each republic to draft its own constitution and legislation, and otherwise exercise local government.¹⁷¹ However, the 1936 Constitution exhaustively regulated the structure of these local governments.¹⁷² Furthermore, it failed to prevent Stalin from deporting entire ethnic groups¹⁷³ or from altering the composition of the union arbitrarily.¹⁷⁴

The 1936 Constitution reflected the union government's enhanced powers in economics, agriculture, social and educational matters, ownership of land, resources, and enterprises, and all forms of infrastructure. The constitution also introduced a supremacy clause, which extended to all legislative acts of the union.¹⁷⁵ The Presidium of the Supreme Soviet, a political rather than judicial body, received the power to annul decrees of the union republics that failed to conform to the law.¹⁷⁶ On an institutional level, the 1936 Constitution granted exclusive legislative powers to the bicameral Supreme Soviet.¹⁷⁷ Such a grant of power departed from the 1924 Constitution's complex system of intragovernmental delegation of powers. This delegation became unnecessary because, with the help of propaganda, secret police, and mass psychology, the single party system eradicated any attempts to increase autonomy.¹⁷⁸

Two 1944 amendments to the 1936 Constitution are particularly noteworthy. The first granted the republics the power to enter into direct relations with foreign nations, conclude agreements with other

170. KONST. SSSR art. 6 (1936).

171. *Id.* art. 16. The constitution further provided for the creation of so-called Autonomous Socialist Soviet Republics, which would have their own constitutions, yet be located within the union's territory. *Id.* art. 82. The republics' constitutions were almost identical to the union's constitution, and reflected few genuine republic powers. This demonstrates the constitutions' limited legal value and the republics' minimal autonomy. See UNGER, *supra* note 103, at 90.

172. KONST. SSSR arts. 94-101 (1936).

173. UNGER, *supra* note 103, at 92. During Stalin's terrorism, the Volga Germans, Crimean Tatars, Chechens, Ingushi, Balkars, and Kalmyks were all removed from their autonomous republics. *Id.*

174. New republics were created, and then deleted or altered. See *id.* at 86.

175. KONST. SSSR arts. 19-20 (1936). The 1924 Constitution was, in effect, already supreme. See *supra* notes 165-67 and accompanying text.

176. KONST. SSSR art. 49(f) (1936). The jurisdiction of the supreme court was altered to exclude constitutional cases. It became merely an instrument for monitoring the republics' courts. See Solomon, *supra* note 161, at 129-31.

177. KONST. SSSR arts. 32-33, 37 (1936). The Supreme Soviet was composed of the Council of the Union and the Council of the Nationalities. *Id.*

178. See HAZARD, *supra* note 102, at 10.

nations, and exchange diplomatic and consular representatives.¹⁷⁹ This amendment was designed to provide the Soviet Union with greater representation in the future United Nations.

The subsequent admission of Ukraine and Byelorussia to the United Nations, part of a political compromise among the World War II allies, partially achieved that goal.¹⁸⁰ Nevertheless, the 1944 amendment introduced a new feature that became part of the pattern of socialist federalism. Apparently, the amendment was an attempt to revive the pre-1922 situation in which the republics were essentially sovereign countries that conducted their own foreign policies.¹⁸¹ Most Western jurists, however, rejected the Soviet concept of the republics' sovereignty, given the republics' factual and legal dependence on the central government.¹⁸² Because a mere constitutional change could not grant international status to the members of a federation,¹⁸³ the world community did not honor the Soviet republics' claims of sovereignty.¹⁸⁴ The admission of two republics to the United Nations was a mere political accommodation, and it did not result in formal recognition of the other Soviet republics as full members of the international community.¹⁸⁵

Another 1944 constitutional amendment gave the republics the right to maintain their own military forces.¹⁸⁶ However, this provi-

179. KONST. SSSR art. 18(a) (1936) (amended 1944). Under article 14(a), as amended in 1944, the union monitored and regulated the republics' conduct of foreign affairs. *Id.* art. 14(a) (amended 1944). See generally Hazard, *supra* note 119, at 420-22.

180. The Dumbarton Oaks Conference proposed the structure for a new international organization charged with maintaining peace and security, which later became the United Nations. Initially, the Soviet delegation requested seats for each of its 15 union republics. The Western delegation opposed this request. Eventually, a compromise was reached at the Yalta Conference of 1945, granting the Ukrainian and the Byelorussian Soviet Socialist Republics admission to the United Nations. See Hazard, *supra* note 119, at 420-21; UNGER, *supra* note 103, at 90.

181. Some Soviet jurists claimed that the republics never lost their pre-1922 status, even when they joined the union. See Hazard, *supra* note 119, at 421. However, this view overlooks the fact that the 1922 Union Treaty was designed to create a new, unified state. See *supra* notes 151-53 and accompanying text.

182. Hazard, *supra* note 119, at 421.

183. *Id.*; see also HENKIN ET AL., *supra* note 86, at 401-03.

184. Nevertheless, this 1944 amendment fueled debate over the constitutive and declaratory theories of state recognition. Under the constitutive theory, formal recognition by other states is a prerequisite for a territorial entity to gain international personality. Under the declaratory view, a state's existence depends on whether the territorial entity meets the international law requirements for statehood. HENKIN ET AL., *supra* note 86, at 231-32.

185. See Hazard, *supra* note 119, at 421; HENKIN ET AL., *supra* note 86, at 402-03.

186. KONST. SSSR art. 18(b) (1936) (amended 1944). However, the constitution also allowed the union to regulate these forces. See *id.* art. 14(g) (amended 1944).

sion had no practical effect on the Red Army.¹⁸⁷ In sum, due to the strength of the Communist party, the 1944 amendments had little value beyond that of propaganda. Yet, the amendments did introduce confederative features into the federal order of the Soviet Union, and these features became relevant when the question of defining the union re-emerged in 1988.

3. The Union Constitution of 1977

Khrushchev's rise to power brought with it the idea of revising the 1936 Constitution.¹⁸⁸ Under Brezhnev, however, the revision process slowed and became a peripheral issue.¹⁸⁹ Almost ten years were spent drafting a new constitution, which was heavily influenced by state supremacy in political, economic, and social matters.¹⁹⁰ The resulting 1977 Constitution made the state responsible for almost all services and gave it power to direct nearly all aspects of life. The constitution did not, however, provide the republics with the ability to limit state activity. Rather, it centralized power within the union and strengthened the Communist party's leading role in society by according it constitutional recognition.¹⁹¹ The constitution's lengthy catalogue of fundamental individual rights and freedoms¹⁹² was linked with duties toward the state,¹⁹³ and was subordinated to the interests of society and the state.¹⁹⁴ Therefore, there were neither legal limits on the state's power nor protected individual and republic freedoms.

187. See HAZARD, *supra* note 102, at 103-04.

188. See Kavass & Christian, *supra* note 123, at 556-58.

189. In 1959, the Twenty-first Party Congress, still under Khrushchev's leadership, considered deleting the dictatorship of the proletariat set forth in article 2 of the 1936 Constitution, and substituting principles of democracy and social justice that reflected a more advanced state of socialism. *Id.*; UNGER, *supra* note 103, at 173.

190. Kavass & Christian, *supra* note 123, at 563-64; see KONST. SSSR arts. 1-27 (1977) (describing the range of state activity and the nature of the advanced socialist socioeconomic system). Article 16 of the 1977 Constitution stated:

The economy of the USSR is an integral economic complex comprising all the elements of social production, distribution, and exchange on its territory.

The economy is managed on the basis of state plans for economic and social development, with due account of the sectoral and territorial principles, and by combining centralised direction with the managerial independence and initiative of individual and amalgamated enterprises and other organisations

Id. art. 16, translated in Kavass & Christian, *supra* note 123, 606-07.

191. See KONST. SSSR art. 6 (1977).

192. See *id.* arts. 39-69.

193. See *id.* art. 59 ("Citizens' exercise of their rights and freedoms is inseparable from the performance of their duties and obligations."), translated in Kavass & Christian, *supra* note 123, at 619.

194. See *id.* art. 39.

Such comprehensive state activity affected local autonomy adversely. While the 1977 Constitution allegedly protected the nationalities,¹⁹⁵ it also contemplated eradicating the differences between them.¹⁹⁶ The detailed provisions addressing the legal status of union republics and autonomous republics,¹⁹⁷ and the establishment of a complicated federal structure, did not create genuine republic powers.¹⁹⁸ The republics depended completely on the central government. Article 73 enumerated the center's powers, which included the power to decide "questions of All-Union importance."¹⁹⁹ Thus, the center's powers were virtually unlimited. The republics were not only de facto denied autonomy, they were also de jure subjected to broad constitutional duties, particularly in the areas of economy and social welfare.²⁰⁰

In this framework, the republics were merely extensions of the union bureaucracy, vested with the duty to exercise delegated administrative powers under the center's strict control.²⁰¹ On the other hand, federalism had a substantial impact on the Soviet Union's system of government. The republics were represented in the Soviet of Nationalities, one chamber of the bicameral Supreme Soviet of the

195. *See id.* arts. 70-88.

196. *See id.* art. 19. Article 19 stated: "The state helps enhance the social homogeneity of society; namely, the elimination of class differences and of the essential distinctions between town and country and between mental and physical labour; and the all-round development and drawing together of all the nations and nationalities of the USSR." *Id.*, translated in Kavass & Christian, *supra* note 123, at 606. Article 36, which was similarly ambiguous, stated:

Citizens of the USSR of different races and nationalities have equal rights.

Exercise of these rights is ensured by a policy of all-round development and drawing together of all the nations and nationalities of the USSR, by educating citizens in the spirit of Soviet patriotism and socialist internationalism

Id. art. 36, translated in Kavass & Christian, *supra* note 123, at 611.

197. *See id.* arts. 76-88.

198. In regard to the powers of the republics, the constitution mentioned only the insignificant right of republics to enact their own constitutions, the right to determine their territorial subdivisions, and the right to conduct foreign affairs. *See id.* arts. 76, 79, 80.

199. *Id.* art. 73(12), translated in Kavass & Christian, *supra* note 123, at 624; *see also* HANNUM, *supra* note 104, at 361.

200. *See* KONST. SSSR art. 77 (1977). Article 77 stated:

A Union Republic shall ensure comprehensive economic and social development on its territory, facilitate the exercise of the powers of the USSR on its territory, and implement the decisions of the highest bodies of state authority and administration of the USSR. In matters that come within its jurisdiction, a Union Republic shall co-ordinate and control the activity of enterprises, institutions, and organisations subordinate to the Union.

Id., translated in Kavass & Christian, *supra* note 123, at 624-25. Article 83 used identical language in regard to the Autonomous Soviet Socialist Republics. *See id.* art. 83.

201. *See* HAZARD, *supra* note 102, at 112-34 (describing the processes of centralization, decentralization, and recentralization under Stalin, Khrushchev, and Brezhnev).

USSR,²⁰² and they maintained their own constitutions, governments, and administrations. The structure of the administration and the judiciary was based upon the territorial subdivision of the country.²⁰³ Local and republic soviets enacted laws, made political decisions, and elected representatives for public and administrative positions. However, the economy's central planning, the principle of democratic centralism,²⁰⁴ and the Communist party's structure destroyed any concrete benefits of the federal system. Thus, the republics were left in a truly impotent position where they could not levy taxes nor dispose of revenues.²⁰⁵

The basic features of socialist federalism as developed in the 1924 and 1936 constitutions, however, remained intact. The term "socialist federalism" appeared for the first time in the 1977 Constitution.²⁰⁶ Although the constitution deleted the grant of republic military formations, it restated the republics' right of secession,²⁰⁷ and reconfirmed their treaty making power, right to conduct foreign affairs, and status as members of international organizations.²⁰⁸ In addition, the 1977 Constitution explicitly attributed sovereignty to the union republics.²⁰⁹ However, such guarantees did not ensure the republics' autonomy. Rather, because the republics' legal and political subordination under the central government's authority excluded such autonomy, the inclusion of republic sovereignty in the 1977 Constitution

202. See KONST. SSSR arts. 109-10 (1977).

203. See HAZARD, *supra* note 102, at 115-17, 196-97.

204. Article 3 of the 1977 Constitution stated that "[t]he the Soviet State is organised and functions on the principle of democratic centralism, namely the electiveness of all bodies of state authority, from the lowest to the highest, their accountability to the people, and the obligation of lower bodies to observe the decisions of higher ones." KONST. SSSR art. 3 (1977), translated in Kavass & Christian, *supra* note 123, at 601.

205. See HAZARD, *supra* note 102, at 107-08. The central government had exclusive jurisdiction over drafting and approving budgets, including those of the republics. See KONST. SSSR art. 73 (1977).

206. The ambiguous and contradictory notions underlying Soviet federalism can be found in article 70: "The Union of Soviet Socialist Republics is an integral, federal, multinational state formed on the principle of socialist federalism as a result of the free self-determination of nations and the voluntary association of equal Soviet Socialist Republics." KONST. SSSR art. 70 (1977), translated in Kavass & Christian, *supra* note 123, at 621.

207. *Id.* art. 72.

208. *Id.* art. 80. The central government monitored the foreign policy activities of the republics. *Id.* art. 73(10).

209. See *id.* art. 76. The constitution described the 15 union republics as sovereign, whereas the autonomous republics, regions, and areas lacked this characterization. Although sovereignty was not found in any previous constitution, some Soviet textbooks claimed that republic sovereignty existed prior to the 1977 Constitution. Hazard, *supra* note 119, at 421.

merely added another element of ambiguity to the structure of the Soviet Union.

IV. CRISIS: *PERESTROIKA* AND THE DISINTEGRATION OF THE UNION

A. *Issues*

At the Nineteenth Party Conference in July 1988, Mikhail Gorbachev, then Secretary General of the Communist party, announced his plan to transform the entire Soviet political system.²¹⁰ Reform of the federal structure was a primary concern. However, the well-intentioned policies of *glasnost* and *perestroika*²¹¹ revealed long-suppressed hostilities between the union and the republics, as well as among the nationalities.²¹² Strong centrifugal tendencies emerged, including outspoken separatism. Both the vertical and horizontal power structures were affected adversely. Moreover, clashes between nationalities and ethnic groups,²¹³ and challenges to the union's institutions by the republics and other territorial entities, led to a rapid decline in the union's authority and power. The union's poor economic performance and failure as an arbiter between rival nationalities further encouraged disintegrative tendencies. Increasingly, the revolt of the periphery went beyond the scope of a typical power struggle within a federation. The revolt undermined and destroyed the traditional legal and political framework of socialist federalism that had developed since 1917.²¹⁴

210. The plan contemplated the following stages: (1) reform of the institutions of the union government; (2) reform of the local government; and (3) conclusion of a new union treaty and new constitution. See Vladimir N. Brovkin, *The Politics of Constitutional Reform: The New Power Structure and the Role of the Party*, 23 CORNELL INT'L L.J. 323 (1990).

211. See *supra* note 3.

212. These hostilities included (1) clashes between ethnic minorities; (2) an emerging strong, and sometimes violent, nationalism in most of the republics; (3) national rivalries within republics; (4) violent border disputes; and (5) explosions of popular unrest and riots throughout the Soviet Union. See Gleason, *supra* note 5, at 32-35; see also Brzezinski, *supra* note 1, at 1; Simes, *supra* note 6, at 97; Brill Olcott, *The Soviet Dis(union)*, *supra* note 4, at 118-36. At a meeting of the Central Committee of the Soviet Communist party, President Gorbachev warned that ethnic conflicts, anarchy, and separatism could turn the Soviet Union into another Lebanon. Celestine Bohlen, *Top Soviet Committee Faces Irrelevance*, N.Y. TIMES, Oct. 9, 1990, at A3.

213. See generally Brzezinski, *supra* note 1. For a more recent assessment, see Brill Olcott, *The Soviet Dis(union)*, *supra* note 4.

214. Celestine Bohlen, *Soviet Crackdown: Warsaw Pact; Eastern Europe Treads Softly on the Baltic Issue*, N.Y. TIMES, Jan. 24, 1991, at A8; Craig R. Whitney, *Soviet Crackdown: The Kremlin; Moscow's Ironhand*, N.Y. TIMES, Jan. 22, 1991, at A14; Bill Keller, *Soviet Crack-*

Thus, basic relations between the union and the republics became strained. The issues that eventually emerged dated back to the 1922 Union Treaty, with most of the republics questioning and rejecting the treaty's legacy and legitimacy. President Gorbachev himself proposed to draft a new union treaty in 1988,²¹⁵ thus implying that the 1922 Union Treaty had become outdated. President Gorbachev's policies of *glasnost* and *perestroika* completely changed the economic, political, and social fabric of the Soviet Union. The existing legal framework lost its legitimacy, the Communist party no longer exercised monolithic power, the Red Army lost its influence, the political protagonists changed, and the republics showed more self-confidence than ever before. It was exactly these developments that the failed coup of 1991 aimed to reverse. However, this process of change turned out to be irreversible. The disintegration of socialist federalism was unstoppable.²¹⁶

B. Disintegration of Socialist Federalism: The Decline of Basic Integrative Forces of the Communist State

The policies of *perestroika* and *glasnost* enabled the republics to articulate new approaches for restructuring the union. With the centrally planned economy rapidly deteriorating,²¹⁷ the Communist party losing credibility and power, the Red Army involved in the unpopular and unsuccessful war in Afghanistan, and a fossilized ideology, the integrative forces of the multiethnic empire declined. The delicate balance of the Soviet federated system, where societal forces played a prevailing role over constitutional grants, shifted.

New political forces successfully pressed for abolition of the so-called "leading role" of the Communist party.²¹⁸ Union legislative reform, allowing the participation of non-Communists, created the Congress of People's Deputies.²¹⁹ This altered the composition of the new Supreme Soviet, which differed considerably from its predecessor.²²⁰ In addition, democratization in some republics precipitated

down: *Lithuania; The Crushing of Lithuania's Independence Drive: A Precise Script is Detected*, N.Y. TIMES, Jan. 16, 1991, at A8.

215. See *supra* note 210 and accompanying text.

216. Part IV of this Article examines only the pre-coup period of 1988 to 1991. For an analysis of the developments occurring in the aftermath of the failed coup, see *infra* part VII.

217. See generally Vasily Selyunin, *The Collapse of the Consumer Market in the U.S.S.R.*, 6 GLOBAL AFF. 22, 22-24 (1991).

218. See Brovkin, *supra* note 210, at 327.

219. *Id.* at 324.

220. However, the new Supreme Soviet was still far from being a representative, demo-

political changes, which, in turn, precipitated local Communists to lose power. At the same time, independent representatives who advocated genuine federalism were elected to serve in republic governments and the Supreme Soviet.²²¹ As a result, the Communist party began to dissolve, and steadily lost its power and influence over state institutions.²²² Even though President Gorbachev relied on the Communist party and other conservative groups before the coup attempt to support his plans to re-establish law and order and to preserve the union's integrity, the Communist party increasingly faced marginalization.

Furthermore, the unpopular war in Afghanistan degraded the reputation of the Red Army, a once powerful instrument of the Communist party.²²³ In addition, President Gorbachev's reforms from 1988 to 1990 reversed traditional Communist doctrine and undermined the basis for the army. Due to political changes, economic crises, emerging nationalism, and the Soviet Union's hasty withdrawal from the former eastern European satellites, the Red Army's command structure was in chaos.²²⁴ Thus, the army's military doctrine, manpower policy, political weight, and relationship with political authorities and the military industry were altered.²²⁵

The principle of "extraterritoriality" in the placement of servicemen also came under attack.²²⁶ Draft-dodging was rampant, and was

cratic body. In the Congress of People's Deputies, which elected the representatives of the Supreme Soviet, 700 seats were reserved for members of the Communist party or the various political organizations that the Communist party controlled. See Brovkin, *supra* note 210, at 325. The new system was not intended to create real political pluralism. Nevertheless, the Supreme Soviet became a somewhat more pluralist body, despite its lack of democratic legitimacy. See Ludwowski, *supra* note 3, at 149.

221. In contrast, the central institutions remained dominated by Russians and the RSFSR. The reform of the parliamentary system weakened the relative influence of the non-Russian republics on the union government. The fact that the unicameral Congress of People's Deputies elected the bicameral Supreme Soviet lessened the republican electorate's influence on the composition of the Supreme Soviet. See Kux, *supra* note 61, at 14-15.

222. See Brovkin, *supra* note 210, at 333. For a discussion of recent problems in the Soviet Union's Communist party, see Bohlen, *supra* note 212, at A3, which reports on a Central Committee meeting where members of the Soviet Communist party discussed the party's situation.

223. See HAZARD, *supra* note 102, at 142.

224. Celestine Bohlen, *Soviets Are Deep in Troop Rumors*, N.Y. TIMES, Sept. 27, 1990, at A5.

225. See William E. Odom, *The Soviet Military in Transition*, 39 PROBS. OF COMMUNISM 51 (1990).

226. *Id.* at 60. According to former Chief of Staff Mikhail Moiseyev, 25% of all non-Russian draftees served in their home districts. See Kux, *supra* note 61, at 13-14 (quoting IZVESTIYA, Mar. 12, 1990).

sometimes even supported by local governments and political movements.²²⁷ The revolt of the republics eventually reached the core of the Red Army. Some republics claimed the right to a republic militia.²²⁸ Others declared themselves "permanently neutral" and "nuclear-free zones."²²⁹ For example, in 1990, Lithuania already considered the drafting of its citizens into the union army a violation of the Hague and Geneva conventions.²³⁰ Still other republics asserted that their drafted citizens could not be deployed outside their borders without government consent.²³¹

Accordingly, the strength of the army's political influence and its role in restructuring the Soviet Union were unknown. Because the majority of the officers were still members of the Communist party,²³² rumors circulated regarding a possible military coup.²³³ A significant portion of the officer corps was angry over the army's loss of prestige,²³⁴ and favored a hard-line policy against separatism.²³⁵ Before the failed coup of August 19, 1991, the military was a centralized institution that represented the union's power and authority, and stood ready to defend the union against separatism.²³⁶ The Soviet Defense Minister, Marshal Dimitri T. Yazov, authorized the army to use force in defending itself against local armed attacks.²³⁷ Previously, President Gorbachev relied on military force to settle ethnic disputes

227. See Kux, *supra* note 61, at 14. The Baltic republics' support of draft evasion was one reason for the center's use of military force against them in early 1991. Craig R. Whitney, *Moscow Is Sending Troops to Baltics to Enforce Draft*, N.Y. TIMES, Jan. 8, 1991, at A1. The Estonian legislature had previously established a civilian service for draft evaders violating union laws. See Bill Keller, *Gorbachev Asks Vote on Unity in the Republics*, N.Y. TIMES, Dec. 18, 1990, at A7.

228. Republics had the right to a republic militia under the 1936 Constitution. See KONST. SSSR art. 18(b) (1936) (amended 1944 and repealed 1977); see also *supra* notes 186-87 and accompanying text.

229. See, e.g., *Ukraine, Byelorussia Declare Sovereignty*, *supra* note 4, at 8.

230. *Statement by the Presidium of the Supreme Soviet of the Republic of Lithuania*, CURRENT DIG. SOVIET PRESS, May 9, 1990, at 12-13.

231. See Bohlen, *supra* note 224, at A5.

232. See, e.g., *Ukraine, Belorussia Declare Sovereignty*, *supra* note 4, at 8; *Armenian Declaration of Independence*, YEREVAH GOLOS ARMEUII, Aug. 23, 1990, at 1.

233. Bill Keller, *Soviet Military Grows Resentful At Gorbachev's Policy of Change*, N.Y. TIMES, Dec. 24, 1990, at A1.

234. *Id.*

235. Bill Keller, *Gorbachev Urged to Consider Crackdown in Republics*, N.Y. TIMES, Dec. 20, 1990, at A3.

236. See Keller, *supra* note 233.

237. Bill Keller, *Soviet Army Told to Use Force to Defend Itself in the Republics*, N.Y. TIMES, Nov. 28, 1990, at A1.

and enforce the union's authority in the republics.²³⁸

C. The Challenge to the Legal Framework of the Socialist Federation: The Republics' Declarations of Legal Sovereignty

1. The Breakdown of the Socialist Rule of Law

As the union began to deteriorate, inconsistencies in the constitutional framework of socialist federalism became increasingly apparent. The language of the 1977 Constitution granted basic principles such as self-determination,²³⁹ the right to secede,²⁴⁰ and republic sovereignty.²⁴¹ This constitution also helped the republics find a legal and doctrinal basis for genuine republic powers. Yet, socialist constitutions were intended to be programmatic rather than legally binding.²⁴² For example, they failed to provide procedures for protecting individual rights and determining when a violation of the separation of powers doctrine occurred. They also failed to enforce the constitutional rights of the republics.²⁴³ However, because the power assumptions of the republics had some foundation in the existing constitutional framework, it was difficult for President Gorbachev to deny the legitimacy of the republics' claims.

The substantive inconsistencies in the 1977 Constitution, and its questionable legitimacy, further undermined the Soviet Union's ability to uphold law and order. Originally, President Gorbachev designed a program to transform the social, economic, and political systems through the implementation of new laws, rather than through mere party orders. His utilization of the law to legitimize social and economic change²⁴⁴ was a striking feature of his reforms, unprece-

238. The union's use of military force in Nagorno-Karabakh and other areas affected by ethnic and nationalistic riots reinforced the army's reputation in some republics and regions as a repressive instrument of the union government and the Russian majority. See Gleason, *supra* note 5, at 37-38.

239. KONST. SSSR art. 70.

240. *Id.* art. 72.

241. *Id.* art. 76.

242. Hazard, *supra* note 127, at 300.

243. This has changed with the reinforcement of the judicial branch and the establishment of the Committee of Constitutional Supervision. See John Quigley, *The Soviet Union as a State Under the Rule of Law: An Overview*, 23 CORNELL INT'L L.J. 205, 211 (1990); Herbert Hausmaninger, *The Committee of Constitutional Supervision of the USSR*, 23 CORNELL INT'L L.J. 287 (1990).

244. See, e.g., Robert Sharlet, *Soviet Legal Reform in Historical Context*, 28 COLUM. J. TRANSNAT'L L. 5, 9 (1990). But see Motala, *supra* note 127, at 241 (stating that the use of law as a means of social and economic change is a common feature in socialist countries).

dented in Soviet history.²⁴⁵ Indeed, no problem was immune from legal treatment.²⁴⁶

President Gorbachev intended these reforms to establish a government of laws in a socialist society.²⁴⁷ However, the Soviet Union had no tradition of the rule of law, separation of powers, or limited government.²⁴⁸ These fundamentals of a government of laws were constrained by the socialist order, which subordinated them to socialism.²⁴⁹ Therefore, it was not surprising that President Gorbachev's attempts to follow constitutional principles in effectuating a change in the Soviet federal structure failed.

Upon the breakdown of the unified, party-dominated state, the opposing forces within the Soviet Union did not consider themselves bound by the existing constitution.²⁵⁰ This was true with regard to the republics as well as the conservative supporters of the old center. The coup attempt was universally condemned as a clear violation of the 1977 Constitution. Yet, the republics also infringed the existing constitutional order, and aimed to change it without using the official constitutional procedures.

2. Declarations of Sovereignty

Between 1988 and 1990, all of the union republics, and most of the autonomous republics and regions, promulgated declarations of sovereignty.²⁵¹ Smaller regions and cities also participated in the trend, marking the first climax in the uprising of the republics against

245. See Sharlet, *supra* note 244, at 16; Quigley, *supra* note 243, at 206.

246. Among other things, Gorbachev's legal reforms (1) restructured the power relationship between governmental institutions, creating a more balanced power structure in the union government; (2) reinforced the judicial branch; (3) created a court-like Committee of Constitutional Supervision; (4) improved human rights, civil liberties, and religious protection; and (5) enhanced economic freedom. See Sharlet, *supra* note 244, at 13-15.

247. See *id.*; Quigley, *supra* note 243.

248. See HAZARD, *supra* note 102, at 191-92; Quigley, *supra* note 243, at 224-25; John Quigley, *Law Reform and the Soviet Courts*, 28 COLUM. J. TRANSNAT'L L. 59, 66-68 (1990). For a more comprehensive study, see Motala, *supra* note 127.

249. See KONST. SSSR art. 39 (1977). The same was true with regard to federalism. See *id.* art. 70 (describing the Soviet Union as a "multinational state formed on the principle of socialist federalism"), translated in Kavass & Christian, *supra* note 123, at 621.

250. See generally Kux, *supra* note 61. The absence of reasonable legal or political problem solving mechanisms in the 1977 Constitution further contributed to the process of political and legal disintegration. The escalation of center-periphery conflicts was caused by an inadequate political negotiation structure and the absence of legal mechanisms to implement peaceful resolution of conflicts. Such structures were never developed because there was no need for them during Communist rule. See *id.*

251. See *supra* note 4.

the Communist-dominated center. The republics' assertions of sovereignty, which could be based on the 1977 Constitution,²⁵² were not merely political statements. Their assertions also had an enormous political impact and provided a basis for autonomous political and legal change, helping the republics to gain full political freedom and independence.²⁵³

Generally, sovereignty should include a fundamental shift in the vertical power structure—a shift of the *Kompetenzkompetenz*²⁵⁴ or the *Grundnorm*²⁵⁵—from the center to the constituent entities. It was unclear whether the republics endorsed the concept of dual sovereignty, which would have made the union and the republics co-equals.²⁵⁶ However, it was clear that republic sovereignty should serve as the foundation for a new legal and political order, by operating as the main source of law and power within the union. Moreover, this suggested that power was delegated, rather than surrendered, to the central authority, thus beginning a confederative structure.²⁵⁷ On the other hand, the declarations of sovereignty did not necessarily include external sovereignty.²⁵⁸ However, external sovereignty was included in the declarations of independence later promulgated by the Soviet republics seeking outright and complete secession.²⁵⁹

3. Supremacy of Republic Law

As a result of the republics' alleged status of political sovereignty, each republic established the supremacy of its constitution and laws within its own territory.²⁶⁰ In addition, the republics claimed the

252. See KONST. SSSR art. 76 (1977); see also *supra* notes 206-09 and accompanying text.

253. The rights of statehood include cultural and economic sovereignty, the property rights of the republics, and the supremacy of the republics' laws. See *infra* notes 260-64, 271-72 and accompanying text.

254. See *supra* text accompanying note 65.

255. See *supra* note 151.

256. Such a view was apparently endorsed in the Declaration on the State Sovereignty of the RSFSR: "The Russian Soviet Federated Socialist Republic shall be united with other republics into a Union on the basis of a Treaty. The RSFSR shall recognise and respect the sovereign rights of the union republics and the USSR." DECLARATION ON THE STATE SOVEREIGNTY OF THE RUSSIAN SOVIET FEDERATED SOCIALIST REPUBLIC, translated in BASIC DOCUMENTS, *supra* note 4, at 140. The United States Supreme Court rejected the concept of dual sovereignty in *Sanitary Dist. v. United States*, 266 U.S. 405, 425 (1925) ("This is not a controversy between equals."). For further reference, see *Lenaerts*, *supra* note 21, at 260.

257. See *Lane*, *supra* note 33, at 179 (arguing that a mere delegation of power, as opposed to a real transfer, shows that a system is confederate in nature).

258. See *supra* note 4.

259. See *supra* note 5.

260. See, e.g., DECLARATION ON THE STATE SOVEREIGNTY OF THE RUSSIAN SOVIET

right to veto any part of the union legislation that was inconsistent with the interests or laws of the republics.²⁶¹ This shift of the *Kompetenzkompetenz*²⁶² began a process of legal disintegration in 1989.²⁶³ The republics' legislatures promulgated laws that conflicted with the union's legislation, and therefore undermined its policies and goals. Additionally, the republics' administrations increasingly refused to enforce union laws, causing a law enforcement crisis. Thus, the supremacy of the republics' laws had drastic structural consequences for the Soviet Union. The union's entire legal structure was shaken, making uniform union legislation and enforcement impossible. As a result, the union's laws became mere proposals, which the republics could accept or reject. The center, deprived of its decision making power, eventually lost its internal sovereignty.²⁶⁴

D. The Challenge to the Economic Framework of the Socialist Federation: The Republics' Declarations of Economic Sovereignty

A similar development occurred in the area of economics. The

FEDERATED SOCIALIST REPUBLIC, *supra* note 4; see also *Ukraine, Byelorussia Declare Sovereignty*, *supra* note 4.

261. Article 74 of the Estonian constitution, as amended in 1988, is a typical example of this challenge:

Laws and other legal acts of the USSR shall come into force in the Estonian SSR after they have been registered in line with the procedure established by the Presidium of the Supreme Soviet of the Estonian SSR.

The Supreme Soviet of the Estonian SSR has the right to suspend or limit the application of legislative or other acts of the USSR if such acts violate the sovereignty of the Estonian SSR or regulate the questions which, according to the Constitution of the Estonian SSR, pertain to the prerogative of said Estonian SSR or disregard the [autonomy] of the republic.

KONSTITUTSIIA [KONST.] ESTONIAN SSR art. 74 (amended 1988), *translated in* Gryazin, *supra* note 4, at 158-59.

262. See *supra* text accompanying note 65.

263. See Gryazin, *supra* note 4, at 158. Article 74 of the Estonian constitution granted the republic's laws absolute supremacy. See KONST. ESTONIAN SSR art. 74 (amended 1988). Terms such as sovereignty, prerogative, and specificity, apparently designed to restrict the republic's veto power, were a political tool of the Estonian republic, to be used against the union's legislation whenever politically appropriate. The terms were so broad, and their content so unclear, that almost all acts and laws of the union could have fallen under this exception clause. See Gryazin, *supra* note 4, at 158.

264. See OLIVER W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 295-96 (1921) ("I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."). Even though union institutions denied the validity of the republics' declarations of supremacy, this could not prevent legal disintegration, since the republics often refused to enforce union laws.

republics' declarations of economic sovereignty, promulgated as part of, or in addition to, their declarations of political sovereignty,²⁶⁵ challenged the Soviet Union's centrally-planned economy. Regulatory power in this area was crucial to socialist statehood, which, if lacking, would deprive sovereignty of much of its substance. The system of centralized economic planning was an important force of integration and centralization in the Soviet Empire, and extended the center's political power over the republics. This system created a highly integrated and interdependent economy controlled by the central bureaucracy and the Communist party,²⁶⁶ and was probably the most effective means for destroying federalism and autonomy in the republics and regions.²⁶⁷ In combination with union ownership,²⁶⁸ it deprived the republics of all economic and property rights.²⁶⁹

In contrast to general sovereignty, the concept of economic sovereignty did not have its roots in the 1977 Constitution. Instead, its doctrinal basis dated back to the process of decolonization. Developing countries complained about the unjust economic trade relations under colonialism, which were perpetuated by the traditional economic regime. As a countermeasure, the doctrine of economic sovereignty was developed.²⁷⁰ This concept required comprehensive

265. See ON PROTECTING THE ECONOMIC FOUNDATIONS OF THE SOVEREIGNTY OF THE RSFSR, reprinted in BASIC DOCUMENTS, *supra* note 4, at 143-44; see also Brill Olcott, *The Soviet Dis(union)*, *supra* note 4, at 129-31.

266. See Gleason, *supra* note 5, at 31. There was never serious discussion of giving real economic power to the republics, but local managers were given some autonomy to "improve" the rigid economic system. See HAZARD, *supra* note 102, at 92-123; KONST. SSSR art. 16 (1977). However, article 73 of the 1977 Constitution gave the union complete power to direct the economy, draft and approve economic plans and budgets, impose taxes, and direct sectors of the economy and enterprises. *Id.* Khrushchev's attempts to strengthen local economic autonomy are documented in HAZARD, *supra* note 102, at 122-24.

267. For example, the central government played a key role in the forced collectivization of agriculture by Stalin at the end of the 1920s, which caused millions of deaths by starvation. Collectivization brought agriculture under the tight control of the Communist party and central powers in Moscow. It eradicated the economic and cultural roots of small farmers, and abolished autonomous interrepublic relationships. See HAZARD, *supra* note 102, at 114-24.

268. Essentially, the union owned everything. Peter B. Maggs, *Constitutional Implications of Changes in Property Rights in the USSR*, 23 CORNELL INT'L L.J. 363 (1990).

269. See John N. Hazard, *Gorbachev's Attack on Stalin's Etatisation of Ownership*, 28 COLUM. J. TRANSNAT'L L. 207 (1990) (stating that state ownership and central planning were the necessary and inseparable pillars of a socialist economy).

270. See generally HENKIN, *supra* note 20, at 203-11. The goal of economic sovereignty is a new international economic order based on justice and economic equality, as expressed in the *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975), and the *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, U.N. GAOR, 6th Special Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974).

regulatory and administrative economic power, including political and economic self-determination leading to permanent sovereignty, full ownership and control over natural resources, and independence and sovereignty over decisions concerning economic destiny.²⁷¹ In the context of the Soviet Union's power struggle, the concept of economic sovereignty was invoked to protect the republics against the union's planned economy and its large, inefficient bureaucracies. The concept also embraced ownership of the republics' natural resources, and the right to establish an independent economic system consisting of banks, currencies, and a pricing, financial, and customs system. It further allowed the republics to choose their own economic systems, and envisioned exclusive jurisdiction over the establishment of property rights throughout their territories.²⁷²

The impact of this concept on a centrally-planned economy was as dramatic as the republics' declarations of supremacy of their laws was on the legal system. The sudden and uncontrolled disruptions in the highly interdependent economy, which was based on territorial labor division, led to delivery stops, shortages, and the economic fragmentation of the Soviet Union. Some of the unilateral measures adopted by the republic governments protected their own interests,²⁷³ but also operated as economic barriers within the union.²⁷⁴ This economic isolationism, combined with overregulatory tendencies, affected the flow of goods and services between the republics adversely, and was partially responsible for the complete breakdown of the interdependent national economy. Thus, the economic balkanization of the Soviet Union had begun.

271. See G.A. Res. 3281, *supra* note 270; G.A. Res. 3201, *supra* note 270.

272. See KONST. ESTONIAN SSR art. 11 (amended 1988) (claiming exclusive republic property rights in "land, its minerals, atmospheric air, internal and territorial waters, shelf, forests and other natural resources"), translated in Gryazin, *supra* note 4, at 158; Francis X. Clines, *A Theme Song for the Baltics: March of the Customs Posts*, N.Y. TIMES, Nov. 19, 1990, at A9 (reporting on claim of rights to further free choice in the economic system, create republic currencies, raise new taxes, and impose customs duties); see also *Ukraine, Byelorussia Declare Sovereignty*, *supra* note 4, at 8 (stating that Ukraine and Byelorussia claimed all economic rights, including the right to regulate all forms of property and administer the import and export of goods).

273. Measures taken included rationing, residence requirements to purchase goods, and other administrative measures reminiscent of a wartime economy. The consequences were delivery problems, shortages of goods, widespread breaches of contract, and long lines for basic goods. See Selyunin, *supra* note 217, at 32-43.

274. One example was customs. See Clines, *supra* note 272, at A9.

*E. The Challenge to Territorial Unity of the Socialist Federation:
The Republics' Declarations of Independence in 1990*

1. Secessionist Moves in the Baltic and Other Republics

In 1990, the Baltic republics, the vanguard of the vertical power struggle, declared independence from the union²⁷⁵ after declaring themselves sovereign.²⁷⁶ Already, in 1989, the Georgian parliament had declared Georgia's 1922 incorporation into the union "null and void."²⁷⁷ These declarations of independence marked another crucial climax in the power struggle within the Soviet Union. In 1990, these republics, along with Moldova and Armenia, were already unwilling to join a new union, regardless of its structure.²⁷⁸ Their aim was to secede from the existing union.

The Baltic republics had particularly good reasons to move toward independence. They claimed that the initial decision to join the Soviet Union was illegitimate because it was made by puppet parliaments installed by the Soviets after the 1940 invasions, and that the annexation of these countries, under the Molotov-Ribbentrop Pact, violated international law.²⁷⁹ They considered the existing ties to the union to be illegal infringements on their natural independence and right of self-determination. Accordingly, the Baltic republics concluded that their relations with the Soviet Union were based solely on international law.²⁸⁰ For example, Latvia proclaimed in its Declaration on the Restoration of the Independent Republic of Latvia²⁸¹ that its relations with the Soviet Union were based solely on the August 11, 1920, peace treaty between Latvia and Russia.²⁸² Therefore, it implicitly rejected the authority and laws of the Soviet Union.²⁸³ In-

275. See *supra* note 5.

276. See *supra* note 4.

277. See Kux, *supra* note 61, at 2 (quoting IZVESTIYA, Nov. 21, 1989).

278. See Bill Keller, *Selling Soviet Unity*, N.Y. TIMES, Dec. 19, 1990, at A1, A11; see also *infra* note 379 and accompanying text.

279. See *supra* note 5.

280. For example, Lithuania declared the conscription of Lithuanian citizens into the union army a violation of the Hague and Geneva conventions. *Statement by the Presidium of the Supreme Soviet of the Republic of Lithuania*, *supra* note 230, at 12-13.

281. See *Rejecting Calls for Referendum, Deputies Vote for Independence, Announce a "Transitional Period,"* CURRENT DIG. SOVIET PRESS, June 6, 1990, at 13.

282. See Treaty of Peace, Aug. 11, 1920, Latvia-Russia, 2 L.N.T.S. 195.

283. Latvia had to decide whether Latvian deputies of the union's Supreme Soviet should abandon their seats. It was decided that "[u]ntil the republic gains complete independence, we must keep our seats as USSR People's Deputies." *Latvia: People's Front Deputies to Keep USSR Parliament Seats*, CURRENT DIG. SOVIET PRESS, June 13, 1990, at 16 (quoting Dainis Ivans, member of the Congress of USSR People's Deputies and First Vice-President of the

deed, many Western countries shared the view that the Baltic republics were occupied territories because of the illegal act of annexation in 1940.²⁸⁴ However, the merits of this legal position were clouded by inconsistencies among the states concerning the legality of the annexation²⁸⁵ and the more than fifty years of Soviet domination.

2. Self-Determination and Secession in International Law

An important implication of the concept of self-determination is the idea that invaded peoples may overthrow their invaders to re-establish independence.²⁸⁶ Nevertheless, the Baltic republics' claims raised controversial international law issues, because they (1) emerged within states recognized by the world community; (2) were made by noncolonial peoples; (3) suggested that there was a legal right of self-determination; and (4) implied that the right of self-determination included a right of secession. Although subsequent worldwide recognition as independent nations presented a political solution for the Baltic republics,²⁸⁷ the issue of self-determination of an existing state's component entities remained controversial. Other Soviet republics

USSR Supreme Soviet). Similarly, the Lithuanian deputies described themselves as observers during the discussion of a new presidency law, a position rejected by the Third Congress of USSR People's Deputies. See *Congress Debates Strong Presidency—III*, CURRENT DIG. SOVIET PRESS, May 2, 1990, at 15-16. However, one may question whether the Baltic deputies' participation in the Supreme Soviet disproved the reality of independence and statehood under international law, and reduced the legal implications of the Baltic republics' declarations of independence.

284. Boris Meissner, *Baltic States*, in 12 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 28, at 39, 46 [hereinafter Meissner, *Baltic States*]; Boris Meissner, *The Right of Self-Determination After Helsinki and Its Significance for the Baltic Nations*, 13 CASE W. RES. J. INT'L L. 375 (1981) [hereinafter Meissner, *The Right of Self-Determination*]; William C. Allison, Comment, *Self-Determination and Recent Developments in the Baltic States*, 19 DENV. J. INT'L L. & POL'Y 625, 629-30 (1991). Under the United Nations Charter, any annexation violates the prohibition on the use of force. U.N. CHARTER art. 2, ¶ 4. This was confirmed in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 18, at 337, U.N. Doc. A/8018 (1970), and the *Definition of Aggression Resolution*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 19, at 392, U.N. Doc. A/9619 (1974). Pre-World War II state and League of Nation practice endorsed this view. For example, United States Secretary of State Henry L. Stimson refused "to recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris." Stimson Note of Jan. 7, 1932, *reprinted in* 26 AM. J. INT'L L. 342 (1932).

285. The world community did not unanimously share the Western view. Meissner, *Baltic States*, *supra* note 284, at 46.

286. See HANNUM, *supra* note 104, at 48.

287. See *infra* notes 545-48 and accompanying text.

subsequently asserted the same position as the Baltic states.²⁸⁸ Clearly, there was still much controversy concerning the meaning of self-determination and who could invoke it.²⁸⁹

The United Nations Charter describes self-determination as a goal and a guiding principle of the United Nations, and not as an immediately enforceable right.²⁹⁰ It was not until the process of decolonization began that the United Nations General Assembly endorsed the view that self-determination is a legal right of colonized peoples.²⁹¹ The International Court of Justice ("ICJ") has supported this opinion.²⁹² But, the ICJ and the General Assembly usually apply the right of self-determination only to the process of decolonization, and not to noncolonial countries and peoples. Exceptions to this rule are limited to countries under illegal occupation or domination by foreign countries.²⁹³ Thus, most developed or developing countries adopt a narrow interpretation of self-determination in the post-colonial context, largely because of the ethnic and other forms of heterogeneity that exist in many countries.²⁹⁴

Not surprisingly, international instruments granting self-determination within the context of decolonization also protect the territorial integrity of countries outside the colonial context.²⁹⁵ As a result, the

288. For a legal assessment of international recognition of the Soviet republics, see *infra* notes 618-48 and accompanying text.

289. See generally HENKIN, *supra* note 20, at 176; HANNUM, *supra* note 104, at 27.

290. See U.N. CHARTER arts. 1, ¶ 2, 55, ¶ 1; see also HENKIN, *supra* note 20, at 177-78; HANNUM, *supra* note 104, at 33.

291. See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960). The view that self-determination is a legal right was confirmed in the United Nations Human Rights Covenants of 1966. See G.A. Res. 2200, *supra* note 42, at 49; G.A. Res. 2200, *supra* note 42, at 52. It was again confirmed in General Assembly Resolution 2625. See G.A. Res. 2625, *supra* note 284. General Assembly Resolution 1514 circumscribed the principles of equal rights and self-determination. It stated that, by virtue of the principles of equal rights and self-determination enshrined in the United Nations Charter, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social, and cultural development. Further, according to General Assembly Resolution 1514, every state has the duty to respect this right in accordance with the provisions of the Charter. G.A. Res. 1514, *supra* note 291; see also HANNUM, *supra* note 104, at 33-37.

292. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21) [hereinafter *Namibia*]; Western Sahara, 1975 I.C.J. 12, 31-35 (Oct. 16).

293. See, e.g., G.A. Res. 1127, U.N. GAOR, 11th Sess., Supp. No. 17, at 63, U.N. Doc. A/3572 (1956).

294. This is particularly true in African states. See HANNUM, *supra* note 104, at 46-48.

295. See U.N. CHARTER, art. 2, ¶ 4. More specifically, General Assembly Resolution 2625 provides: "Nothing in the foregoing paragraphs shall be construed as authorizing or

inherent contradiction between self-determination and territorial integrity has generated a debate among scholars.²⁹⁶ Nonetheless, the United Nations' practice reveals that territorial integrity has emerged as a preeminent value. In most cases, the General Assembly and the Security Council have condemned or failed to support secession attempts within existing states.²⁹⁷ The world community, composed of states more interested in preserving their own existence than in the right to self-determination, widely upholds the principle of national unity within existing borders.²⁹⁸

Another controversial issue is that of determining who can claim independence under the principle of self-determination. The United Nations Charter, the United Nations Human Rights Covenants of December 16, 1966,²⁹⁹ and other relevant international documents³⁰⁰ fail to define the term "people." Further, state practice reflects inconsistent definitions. Prior to World War II, United States President Woodrow Wilson set forth criteria based on race, historical antecedents, and economic and commercial cohesiveness.³⁰¹ These criteria were developed to settle nationality problems in the aftermath of World War I. During the era of decolonization, territory, not nationhood, determined which "people" were entitled to independent status under the principle of self-determination.³⁰² This definition created ethnic conflicts in many newly emerging nations because it

encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination" G.A. Res. 2625, *supra* note 284; see also HANNUM, *supra* note 104, at 34.

296. See HENKIN ET AL., *supra* note 86, at 281-82; HANNUM, *supra* note 104, at 44-45.

297. See Christine Haverland, *Secession*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 28, at 384, 386 (referring to Congo, Katanga, South Rhodesia, and Biafra); see also HENKIN, *supra* note 20, at 15-17; Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257, 271-74 (1981).

298. See HANNUM, *supra* note 104, at 46.

299. Article 1 of these covenants states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." G.A. Res. 2200, *supra* note 42, at 49; G.A. Res. 2200, *supra* note 42, at 52.

300. See G.A. Res. 2625, *supra* note 284; see also HANNUM, *supra* note 104, at 32-40; HENKIN ET AL., *supra* note 86, at 281-84; HENKIN, *supra* note 20, at 178 (stating that self-determination as a human right raises the questions of which humans have that right and what it entails). For an elaborate discussion of the inconsistent application of the self-determination principle, see THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 153-74 (1990).

301. See FRANCK, *supra* note 300, at 154; HANNUM, *supra* note 104, at 32-40.

302. See HANNUM, *supra* note 104, at 36.

perpetuated borders that were often drawn arbitrarily by the colonial powers.³⁰³ Self-determination does not inherently require the independence of any national group that might invoke the principle. Minority groups in majority-dominated countries often enjoy only the protection that international human rights instruments provide.³⁰⁴ Indeed, some international agreements treat the terms "minorities" and "peoples" differently, reflecting the view that only "peoples" are entitled to independent status.³⁰⁵ As one scholar observes, the United Nations and state practices since 1960 recognize only two aspects of self-determination as rights: (1) the right to external self-determination, which implies freedom from a colonial power; and (2) the right to internal self-determination, which is defined as a state's independence from foreign occupation or domination.³⁰⁶ Recognition of these rights reflects the world community's chief concerns: the preservation of existing countries' territorial integrity and the universal condemnation of colonialism and foreign occupation.³⁰⁷

Self-determination entailing a right to secede otherwise has limited application,³⁰⁸ although some authors advocate its application outside the colonial context.³⁰⁹ International law does not condemn secession within an existing country when it is directed to acquiring independence.³¹⁰ However, its position is best characterized as ambivalent, as it considers secession an internal phenomenon entailing

303. See *id.*; FRANCK, *supra* note 300, at 154.

304. See, e.g., *International Covenant on Civil and Political Rights*, *supra* note 42, art. 27; Conference on Security and Co-Operation in Europe: Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975), 14 I.L.M. 1292 (1975) [hereinafter Final Act].

305. See, e.g., Final Act, *supra* note 304 (addressing self-determination of peoples in principle VIII and minority protection in principle VII); see also HENKIN ET AL., *supra* note 86, at 283-84.

306. HANNUM, *supra* note 104, at 49.

307. See *supra* notes 292-98 and accompanying text.

308. Freedom from colonialism occurs when a state gains statehood and self-determination by eliminating the economic exploitation and political domination practiced by Western powers during the 19th and 20th centuries. Freedom from foreign occupation occurs when a formerly sovereign state regains its independence by overthrowing invaders. Neither freedom from colonialism nor freedom from foreign occupation constitutes secession. See Haverland, *supra* note 297, at 384-85.

309. See generally LEE C. BUCHHEIT, *SECESSION, THE LEGITIMACY OF SELF-DETERMINATION* (1978); Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779 (1976); Nanda, *supra* note 297; Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991). Numerous minorities, including the Kurds in Turkey and Iraq, the Eritreans in Ethiopia, some national groups in Spain and France, and the Quebecois in Canada, have made such claims. See HENKIN ET AL., *supra* note 86, at 282-83.

310. Haverland, *supra* note 297, at 385.

matters within the affected state's domestic jurisdiction.³¹¹ International law also imposes restrictions on foreign countries that support rebels trying to secede from an existing country.³¹² As international law provides limited support for secession attempts, claims for a broader concept of self-determination entailing a right to secede are based on arguments as to what the international law should be, rather than what it is.

3. Did the Soviet Republics Have an International Law-Based Right to Secede?

Although international law provided only limited support for the Soviet republics' claims for independence, its support was greater than that provided by the Soviet Union's biased domestic legal order. There had always been doubts as to whether the constitutional grant of the right to secede³¹³ was meaningful in the Soviet context.³¹⁴ The union government persistently declared such claims to be illegal. Then, following the Baltic republics' declarations of independence, the Supreme Soviet adopted a law imposing severe restrictions on the exercise of the right to secede.³¹⁵

Before analyzing the issue of whether the Soviet republics and, possibly, some autonomous formations have an international law-based right to secede, one should note that such claims generally have arisen outside of the classic colonial context. The Russian Empire, often described as the "prison of nations,"³¹⁶ had its origins in tsarist imperialism and the internal colonization of nationalities by the Great Russians.³¹⁷ However, in the twentieth century, typical features of

311. *Id.*; see also HENKIN, *supra* note 20, at 174-75.

312. For example, many states considered India's military intervention in support of Bangladesh's independence from Pakistan to be a violation of the United Nations Charter's prohibition against intervening in the domestic affairs of another country. See HENKIN ET AL., *supra* note 86, at 242, 282.

313. See KONST. SSSR art. 72 (1977). All Soviet constitutions have stated that the union's formation resulted from the republics' exercise of their right of self-determination. See, e.g., *id.* art. 70.

314. See *supra* notes 105-16 and accompanying text.

315. *The Law on Secession*, CURRENT DIG. SOVIET PRESS, May 16, 1990, at 20.

316. See *supra* note 1 and accompanying text.

317. This is why the first Communist constitution showed so much sympathy and support for the fight of minorities and nationalities against colonialism and imperialism. See KONST. RSFSR arts. 4-6 (1918). Article 6 "welcomes the policy of the Council of People's Commissars in granting complete independence to Finland, in commencing the withdrawal of troops from Persia, and in proclaiming the right of self-determination for Armenia." *Id.* art. 6, translated in UNGER, *supra* note 103, at 27.

colonialism, such as economic exploitation and suppression of self-government by a foreign country, were not present in the relationship between the union and the republics. The Soviet Union had no history of foreign colonialism,³¹⁸ and it is doubtful whether a quasi-colonial past sufficiently justified the application of concepts developed for overseas colonialism. Moreover, in the twentieth century, the legitimacy of a multinational union, rather than domination or suppression by a foreign power, has generally been at stake.

On the other hand, the Soviet constitutions since 1924 consistently claimed that the union was based on the principle of self-determination, and the possibility of secession was the most important offshoot of this principle. The Soviet Union, along with the remaining European nations, promised to respect the self-determination of peoples in the Helsinki process, particularly in principle VII of the Final Act of the Conference on Security and Co-Operation in Europe³¹⁹ ("Final Act"). This principle applied in both the European and the colonial context.³²⁰ However, the Final Act was merely a political statement expressing adherence to broad principles, and not a legally binding agreement.³²¹ Even so, such political agreements may have legal consequences. The Soviet Union, in light of its constitution and its signing of the Final Act, conceded that its nationalities could invoke the principle of self-determination. But, this did not mean that all of the republics could, as a matter of international law, invoke self-

318. Political, economic, and social crises affected the country as a whole. There appears to have been no unjustified, exploitative transfers of wealth, resources, or capital from one republic to another. The richer and more developed republics, such as the Baltic republics and Ukraine, displayed more desire to separate than did the poorer republics. See generally Brill Olcott, *The Soviet Dis(union)*, *supra* note 4; Selyunin, *supra* note 217.

319. Final Act, *supra* note 304, princ. VII. Principle VII states:

(1) The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

(2) By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

(3) The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States. They also recall the importance of the elimination of any form of violation of this principle.

Id.

320. See HENKIN ET AL., *supra* note 86, at 283.

321. See R.A. Mullerson, *Agora: New Thinking by Soviet Scholars: Sources of International Law: New Tendencies in Soviet Thinking*, 83 AM. J. INT'L L. 494, 509-11 (July 1989).

determination as a right, and derive from it a right to secede. The Soviet government could still have benefitted from international grants of territorial integrity.³²² Furthermore, it could have claimed that the reform projects designed to restructure the union, and the implementation of the constitutional right to secede in the Soviet law on secession,³²³ were consistent with its international obligations to adhere to the self-determination principle. Finally, it could have asserted that most of its nationalities were only minorities, and therefore enjoyed only minority protection. All of these factors made it difficult for the Soviet republics to base their claims of independence on international law.

However, arguments could have been made that the case of the Baltic republics required a different approach. Unlike the other republics, the Baltic republics were independent countries from 1918 to 1940.³²⁴ They had distinct languages and cultures, and their historical development, unlike the rest of the Soviet Union, included long-established links with the Scandinavian countries and Germany.³²⁵ They came under Soviet domination in 1940, following intimidation and an invasion by the Red Army.³²⁶ Their decisions to join the union were made by puppet regimes in violation of basic principles of international law.³²⁷ Under these facts, one could question whether their independence was an act of secession at all. The Baltic republics were occupied countries that had a right under international law to overthrow their invaders to re-establish self-government.³²⁸ Given the illegality of their incorporation into the Soviet Union, the Baltic republics had the support of international law in their struggle for independence. Eventually, the breakup of the Soviet Union enabled the Baltic republics to fully achieve their independence.

F. Destruction of Vertical Ties: Contractual Forms of Interrepublic Cooperation

The concepts of political and economic sovereignty, supremacy of the republics' laws, and claims of independence had a dual impact

322. See *supra* notes 295-98 and accompanying text.

323. See *supra* note 315 and accompanying text.

324. See generally Meissner, *Baltic States*, *supra* note 284; see also *supra* notes 279-84 and accompanying text.

325. See Meissner, *Baltic States*, *supra* note 284, at 39-40.

326. *Id.* at 44-46.

327. *Id.*; see also HANNUM, *supra* note 104, at 49.

328. See *supra* note 306 and accompanying text.

on the Soviet Union as a federation. They radically changed the existing links between the union government and its component entities, and altered relations among the republics, making new forms of inter-republic cooperation both possible and necessary. Moreover, interdependencies created by the system of centralized planning made cooperation necessary for liquidating the outdated economic system and developing a new economic order.

In the spring of 1990, the Baltic republics took their first major step toward independence by concluding agreements for reciprocal deliveries of agricultural goods and raw materials.³²⁹ Next, they renewed the 1934 Treaty on Friendship and Cooperation,³³⁰ and based their future relations on a declaration of unanimity and cooperation.³³¹ In addition, the Baltic republics took steps to establish a common market open to other republics and regions.³³² Other republics followed their example. On July 2, 1990, Moldova and Byelorussia signed an agreement concerning economic, scientific, and technical cooperation, with the goal of eventually creating a common market.³³³ Since July 1990, similar agreements have been concluded between several republics, autonomous regions, other territorial subdivisions, and even large cities.³³⁴ These agreements have been regarded as the only acceptable form of non-authoritarian problem solving.³³⁵

329. *Three Baltic Republics' Agriculture Ministries Sign Agreement on Reciprocal Deliveries*, CURRENT DIG. SOVIET PRESS, June 13, 1990, at 17 ("The Ministries of Agriculture [of the Baltic republics wanted] to act in circumvention of the central departments and establish direct contacts with partners in neighboring republics.").

330. Treaty on Friendship and Cooperation, Sept. 12, 1934, 154 L.N.T.S. 93. This treaty was only one of several agreements among the Baltic republics concluded during the independence period of 1919 to 1940. See Meissner, *Baltic States*, *supra* note 284, at 43-44.

331. See *Three Republics' Supreme Soviet Chairmen Meet, Sign Declaration of Unanimity and Cooperation (Renewing 1934 Treaty)*, CURRENT DIG. SOVIET PRESS, June 13, 1990, at 17.

332. *A 'Common Market' for Soviet Republics?*, CURRENT DIG. SOVIET PRESS, Aug. 1, 1990, at 9.

333. *Id.*

334. See Keller, *supra* note 278, at A1.

335. Konstantin Yavorsky, the Moldovan republic's Minister of Material Resources, stated:

[T]he economic alliance between Byelorussia and Moldova [] is only the first step toward a developed system of interrepublic relations. [These will be r]elations between interested, equal partners in the coming market. . . . Even while the unshakable dictatorship of the State Planning Committee and the State Committee for Material and Technical Supply persists, we have decided, rejecting hesitation, to establish horizontal ties on the republic level. Our next partners will be the Ukraine, Georgia, Armenia and the Russian Republic

A 'Common Market' for Soviet Republics?, *supra* note 332, at 9 (quoting Konstantin Yavorsky).

This contract-based coordination between republics was somewhat similar to the pre-unification period between 1918 and 1922, which was dominated by the RSFSR.³³⁶ However, there were some notable differences. From 1918 to 1922, there was a preliminary move toward building a union, whereas in the pre-coup period of 1990 and 1991, the opposite was true. The republics' goals in the pre-coup period were to seize powers long held by the union, circumvent the central administration and bureaucracy,³³⁷ and establish a network of autonomous relations. This was particularly true in the field of economics, where the republics abandoned the union's laws, bureaucratic regulations, institutions, and powers.³³⁸ Under the vanishing shadow of the center, a new confederative structure, based on principles of equality and sovereignty among the republics, arose.³³⁹

G. *The Soviet Republics as States in the Pre-Coup Period of 1990 to 1991?*

The changes between 1988 and 1991 are best described as a process through which the Soviet republics gained statehood within the decaying federation. The decline of the basic integrative forces of socialist federalism permitted the republics to behave as states. Traditionally, international law defines a state as an entity that is controlled by its own government and has a defined territory, a permanent population, and the capacity to conduct international relations.³⁴⁰ The So-

336. Simes, *supra* note 6, at 110-11. Historical parallels between the present situation and the period following the 1917 revolution increasingly fascinate Soviet academics and journalists. *Id.* at 112.

337. Representative Bronshtein, an Estonian member of the USSR Supreme Soviet, remarked in June 1990 that

[t]he USSR Supreme Soviet's lawmaking activity "for the Union as a whole" is becoming largely irrelevant. One after another, republic parliaments are declaring that their laws take priority over Union laws. . . . Horizontal contractual ties between republics are being developed. . . . I am very much afraid that in this process the existing center may find itself in the role of someone watching a train that has already pulled out of the station.

A 'Common Market' for Soviet Republics?, *supra* note 332, at 10.

338. The contrast with earlier times was striking. A few years ago, a republic theoretically had the option to leave the union, but could not select a textbook for its schools or build a road without Moscow's permission. See generally Kux, *supra* note 61.

339. Sovereignty should underlie the development of new interrepublic relations, "based on treaties concluded in accordance with the principles of equality, mutual respect and non-interference in internal affairs." *Ukraine, Byelorussia Declare Sovereignty, supra* note 4, at 8. A similar idea is the "developed system of interrepublican relations" invoked by the Moldovan republic's Minister of Material Resources. See *supra* note 335.

340. This is the generally accepted definition of statehood. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

viet republics had defined territories and populations,³⁴¹ although they were tightly controlled by the union government. In 1991, however, due to changes in the Soviet Union's economic, legal, and social framework, the republics more effectively controlled their land and populations.³⁴² They expanded their powers and exercised their own authority, while the union increasingly lacked the power to direct the republics.

The republics demonstrated statehood whenever possible by creating economic links with other republics and foreign nations, issuing stamps, planning to introduce currencies and republic citizenship, establishing guards and customs posts along their borders, and enacting new laws.³⁴³ Moreover, the republics had their own governments, which better represented the people than did the old Communist regime, due to the democratization and liberalization of the political system in most of the republics.

The republics also expanded their capacity to engage in formal relations with other states.³⁴⁴ Since 1990, republic leaders sought direct diplomatic contact with foreign governments and requested diplomatic recognition of their new status.³⁴⁵ Some of these efforts were unsuccessful, such as Lithuania's attempts in April and May of 1990 to gain economic aid or recognition as an independent state from Western countries.³⁴⁶ Additionally, the Baltic republics sought to participate in the November 1990 Conference on Security and Cooperation in Europe, but were denied representation separate from the Soviet Union.³⁴⁷ Nevertheless, some of the countries bordering the Soviet Union began to engage in economic cooperation with the Soviet and Baltic republics. The neighboring countries established formal ties in support of the republics' moves for independence, even though they had not recognized the republics as independent countries.³⁴⁸

The concept of sovereignty guided the Soviet republics' seizure of power and authority. The concept of sovereignty, and its legal conse-

341. See *id.* § 201 cmts. b, c.

342. See *id.* § 201 cmt. d.

343. Brill Olcott, *The Soviet Dis(union)*, *supra* note 4, at 129.

344. *Id.* at 125-31.

345. *Id.*

346. *Id.* at 125.

347. *Id.* at 129.

348. *Id.* at 125-26.

quences, were found in both the 1977 Constitution³⁴⁹ and earlier constitutions.³⁵⁰ Through changes originally initiated by President Gorbachev, the republics were able to supplement this notion with concrete political, legal, and economic powers. As a result, two rival powers emerged: the union government and the union republics. Each claimed sovereignty and supremacy over the other, while neither was able to exercise complete state authority. Eventually, a concept of dual sovereignty emerged. Already endorsed in foreign affairs in 1944 when the republics were given foreign relations powers,³⁵¹ this concept of dual sovereignty reached the domestic sphere of power, causing a serious imbalance in the Soviet Union. Dual sovereignty of several co-equal authorities within a country is, in fact, a *contradictio in adjecto*.³⁵² Sovereignty means supreme authority,³⁵³ and, by definition, it may not be vested in several competing bodies within a state. Nevertheless, this is exactly what happened in the Soviet Union. With both the union and the Soviet republics claiming sovereignty, the traditional distinction between federations and confederations in the Soviet Union became blurred.³⁵⁴

Although the increasing powers of the Soviet republics became more apparent, the world community refused to recognize them as states in the pre-coup period of 1990 and 1991. Independence of the republics was an obstacle to their recognition. As long as (1) the supremacy struggle within the union continued; (2) the union was able to exercise enough power to prevent effective and complete independence of the republics; and (3) legal, political, and economic interdependencies remained, the Soviet republics could not be considered members of the world community.³⁵⁵ In the pre-coup period, the union government and the Soviet republics had a relationship of involuntary mutual dependence. Thus, at that time, it was premature to honor the republics' claims of official membership in the international community.³⁵⁶

349. See KONST. SSSR art. 76, § 2 (1977).

350. See *supra* notes 206-09 and accompanying text.

351. See *supra* notes 179-86 and accompanying text.

352. *Contradictio in adjecto* means "a contradiction in terms."

353. See THE AMERICAN HERITAGE DICTIONARY 1169 (2d college ed. 1985).

354. See Lane, *supra* note 33, at 179.

355. Independence is not a requirement of the generally accepted definition of a state in international law. See *supra* note 340 and accompanying text. However, it is implied in the prerequisites of statehood. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 reporters' note 5 (1987).

356. Under international law, formal recognition is not necessary to gain statehood.

V. MOVING TOWARD A NEW EQUILIBRIUM IN THE SOCIALIST FEDERATION: NEW UNION LAWS, A REFERENDUM, AND PROJECTS FOR A NEW UNION TREATY

A. *New Union Laws to Preserve the Federation*

The union government faced challenges to its authority, increasing legal and economic disintegration, and the prospect of partial territorial fragmentation. It reacted with a comprehensive legislative program designed to uphold the fragile federal equilibrium of the union within the traditional framework of socialist federalism.³⁵⁷ The laws attempted to strengthen the union's institutional authority,³⁵⁸ prevent secession of the republics, and preserve territorial integrity.³⁵⁹ They also attempted to decentralize the union's administration and modestly redefine the vertical power structure.³⁶⁰ Finally, the laws addressed the urgent economic problems within the federation.³⁶¹ However, these laws were based on the assumption that the Soviet Union would remain a centralized federation. Such assumption negated the basic political and economic changes caused by the republics' increasing seizure of power.³⁶² Consequently, the republics often disregarded these laws.³⁶³ The union's legislative maneuver³⁶⁴ was an

Countries must treat an entity as a state as soon as it meets the requirements of statehood. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 (1987). Nevertheless, in the case of a newly emerging state, countries often accord official recognition to the state as a new member of the world community. However, when an entity attempting to secede faces resistance from the existing state, international law often requires recognition to be withheld until the circumstances are clear. *Id.* § 202 cmt. d.

357. See BASIC DOCUMENTS, *supra* note 4, for a review of the new laws affecting the relationship between the union and republics.

358. See *The Law Establishing a USSR Presidency*, CURRENT DIG. SOVIET PRESS, May 9, 1990, at 20. For example, the presidency law was part of an amendment to the 1977 Constitution, which eliminated the leading role of the Communist party on the union level. See *id.*

359. See *supra* note 315 and accompanying text. Before the law on secession was enacted, the constitutional right to secede was not regulated in special laws. The secession law imposed strict conditions for the exercise of secession rights, which, according to the 1922 Union Treaty and the union constitutions, were granted unconditionally. See *The Law on Secession*, *supra* note 315, at 20; 1922 Union Treaty, *supra* note 144, art. 26; KONST. SSSR pmbl. (1924); KONST. SSSR art. 6 (1936); KONST. SSSR art. 72 (1977).

360. *Law on USSR, Republic Powers*, CURRENT DIG. SOVIET PRESS, June 13, 1990, at 23.

361. *Law on USSR, Republic Economic Ties*, CURRENT DIG. SOVIET PRESS, July 18, 1990, at 17.

362. See *supra* parts IV.C, D.

363. The law on the Principles of Economic Relations Between the USSR and the Union and Autonomous Republics, which was enacted on April 10, 1990, and was designed to give member states more economic autonomy, is an example of a disregarded law. See CURRENT DIG. SOVIET PRESS, July 18, 1990, at 17-19 (providing a translation of the text of this law); see also Peter B. Maggs, *Constitutional Implications of Changes in Property Rights in the USSR*, 23

inappropriate method of overcoming a vertical power crisis because it could not rectify the center's lack of legitimacy. Instead, the union's plan created an enforcement crisis.³⁶⁵ Against this background, redefining the union in the framework of a new union treaty became a priority. A new union treaty appeared to be the only way to give the Soviet Union the legitimacy necessary to ensure its survival.

Restoring an existing federation by legislation, and redefining it by concluding a new union treaty, are completely distinct approaches. Legislation perpetuates the legitimacy of the existing union and its institutions, and imposes the center's will on the republics. In contrast, a new union treaty between the republics equips the union with renewed legitimacy. This results because a treaty reflects voluntary decisions of the component members, and is thus the legal emanation of autonomous choice.

B. Republic Sovereignty and Self-Determination as the Starting Point of a New Union

Voluntary choice as to a people's system of government is inherent in the principle of self-determination. Several international documents, including United Nations General Assembly resolutions,³⁶⁶ the Final Act,³⁶⁷ and the *Western Sahara* opinion of the ICJ,³⁶⁸ con-

CORNELL INT'L L.J. 363 (1990) (providing a comprehensive overview of the laws disregarded by the republics); Randy Bregman & Dorothy C. Lawrence, *New Developments in Soviet Property Law*, 28 COLUM. J. TRANSNAT'L L. 189 (1990).

364. The Chairman of the USSR Supreme Soviet, Anatoly I. Lukyanov, emphasized at the second anniversary of the renewed Supreme Soviet that this body had adopted 113 laws in the past two years. See *Interview with Anatoly I. Lukyanov* (Moscow All-Union Radio First Program of June 3, 1991), translated in FBIS-SOV-91-108, June 5, 1991, at 6.

365. "The problem of the USSR is not too little, but too much, legislation." Kux, *supra* note 61, at 19. Legislative inflation that promotes conflicting or even contradictory goals by using inconsistent methods confuses administrations and agencies. It also disorients judges and citizens. It has an adverse effect on the quality, predictability, credibility, and legitimacy of law and government, and, therefore, the rule of law in general. In addition, it creates insecurity, chronic confusion over responsibilities, and disregard of the laws. These are all symptoms of a legal and power crisis, such as that which existed in the Soviet Union.

366. See, e.g., G.A. Res. 1514, *supra* note 291; G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960); see also *International Covenant on Civil and Political Rights*, *supra* note 42, art. I, § 1; *International Covenant on Economic, Social and Cultural Rights*, *supra* note 42, art. I, § 1 (stating that all peoples have the right of self-determination, and by virtue of that right, they can freely determine their political status and pursue their economic, social, and cultural development).

367. See Final Act, *supra* note 304, princ. VIII(2) ("By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference . . .").

firm that self-determination includes a people's right to freely determine its political status. Whatever the ultimate decision may be, it must result from a free and sovereign choice, as stated by General Assembly Resolution 2625.³⁶⁹

The Soviet republics' self-determination claims were backed not only by international law, but also by the language of the 1977 Constitution and the 1922 Union Treaty. Both documents based the union's formation on self-determination and the free will of the republics. This suggested that a new union had to be created with regard for the principle of free and voluntary choice. Thus, only an agreement among the republics could embody their sovereignty and self-determination.

The proposal to renegotiate the 1922 Union Treaty was, in effect, the union's recognition of the republics' claims.³⁷⁰ With this proposal, President Gorbachev put the union's future design and existence at stake. The proposal also presumed the continuing validity of the existing union treaty and, therefore, the voluntary nature of the union. Although the 1990 secession law³⁷¹ imposed legal limits on the republics' ability to secede, its constitutionality was doubtful in light of the republics' unconditional right to secede granted by the 1922 Union Treaty and the Soviet Union's constitutions.

C. *The First Negotiations for a New Union Treaty and the Principle of Self-Determination*

The principle of self-determination sets forth procedural standards for conducting negotiations. Such standards are important, as the choice of procedures and protagonists often affects the outcome of

368. See Western Sahara, 1975 I.C.J. 12, 31-33 (Oct.16).

369. See G.A. Res. 2625, *supra* note 284 (stating that "[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination"); see also G.A. Res. 1541, *supra* note 366.

370. President Gorbachev proposed the renegotiation of the 1922 Union Treaty in 1988. He considered a new union treaty to be the last stage of his reform of the Soviet system of government. See Brovkin, *supra* note 210, at 323. The republics' governments enthusiastically pursued his proposal because it was a unique political opportunity to determine the future shape of the union. Subsequently, most republics accepted the idea of a new union treaty, with the exception of the Baltic republics, Georgia, and Moldova. See Ann Sheehy, *The Draft Union Treaty: A Preliminary Assessment*, 51 REPORT ON THE USSR 1 (1990). Some republics' declarations of sovereignty referred to the future union treaty. Ukraine, for example, stated that "[t]he principles of the Declaration on the Sovereignty of the Ukraine shall be used in concluding a Union Treaty." *Ukraine, Byelorussia Declare Sovereignty*, *supra* note 4, at 8.

371. See *supra* notes 315, 359 and accompanying text.

negotiations. Thus, negotiation procedures must reflect the sovereignty and right of self-determination of the states that are willing to form a union.³⁷²

Regardless of the method used to ascertain the will of the "people,"³⁷³ their will must be determined in good faith.³⁷⁴ The Soviet Union's good faith obligation arose from its persistent support of the principle of self-determination in the United Nations, and from its signing the Helsinki Final Act.

From the outset, President Gorbachev's methods of negotiating the new union treaty demonstrated difficulties in accepting this good faith obligation. Although a new treaty would have required ratification by the republics to be valid, a union institution, rather than the republics, drafted the treaty.³⁷⁵ In the ensuing discussions of this draft in the union's Federation Council,³⁷⁶ the republics were limited to a modest explanation of their views, and could not exercise any power. Subsequently, the draft submitted to the republics for discussion and approval was endorsed by another union institution, the Supreme Soviet.³⁷⁷ Thus, the 1990 Draft Treaty was foremost a product of the center, not of the member states.³⁷⁸ As the 1990 Draft Treaty was not a balanced political compromise between the center and periphery, some republics rejected it almost immediately after its

372. The 1922 Union Treaty violated these principles because the peoples in the Soviet republics were forced by their Communist and Moscow-dominated regimes to adhere to the union. This led to a monolithic state structure in which the strong, centralized state neglected ethnic, religious, and linguistic diversity in the republics. See *supra* notes 138-54 and accompanying text. As a result, the treaty failed to create a viable equilibrium in the union, and failed to preserve the right of self-determination of the nationalities.

373. See HENKIN ET AL., *supra* note 86, at 285-86; HANNUM, *supra* note 104, at 40-42.

374. Procedures for determining the will of the people have usually included plebiscites of the local population, which are often held under international supervision. See HENKIN ET AL., *supra* note 86, at 285-86. In some circumstances, consultation with local leaders has been considered a good faith determination of the will of the people. *Id.*; see also FRANCK, *supra* note 300, at 156-66 (criticizing inconsistencies in the practice of international law).

375. A working group nominated by President Gorbachev drew up the first draft treaty. The full text of the draft union treaty was published in PRAVDA, Nov. 24, 1990, at 3, translated in FBIS-SOV-90-227, Nov. 26, 1990, at 39-42 [hereinafter 1990 Draft Treaty].

376. This body, comprised of the republics' representatives, was intended to be an advisory organ to the union's president. See KONST. SSSR art. 127(4) (1977) (amended 1990). The Federation Council was primarily concerned with ethnic conflicts and disputes, and also monitored the 1922 Union Treaty. *Id.*

377. Bill Keller, *Soviet Congress Backs Looser Federation*, N.Y. TIMES, Dec. 25, 1990, at L3.

378. Consultations were held between the USSR Supreme Soviet and each individual republic, but not among the republics themselves. See Sheehy, *supra* note 370.

publication, while others demanded changes and amendments.³⁷⁹ In March 1991, a revised version containing considerable concessions to the republics was published.³⁸⁰ At the same time, the future of the Soviet Union as a union was submitted to a unionwide popular referendum.

D. The Referendum of March 17, 1991

The unionwide referendum,³⁸¹ held on March 17, 1991, was initiated by the Supreme Soviet as another attempt to preserve the union.³⁸² The question submitted to the voters was: "Do you consider it necessary to preserve the Union of Soviet Socialist Republics as a renewed federation of equal sovereign republics, in which the rights and freedoms of people of any nationality will be fully guaranteed?"³⁸³ Moldova, Georgia, and the three Baltic republics demanded secession and refused to participate in the referendum.³⁸⁴ However, a majority of the voters in the republics taking part in the referendum favored preservation of the union.³⁸⁵

In effect, the referendum's result supported the union government's attempt to find a new union equilibrium.³⁸⁶ But, a majority decision by the union's constituents, even if democratic, is not equivalent to the self-determination of the union's component entities. The will to be ascertained is the will of the "people." Though this

379. See *Republic Leaders Comment on Draft*, in FBIS-SOV-90-232, Dec. 3, 1990, at 46-47. The Baltic states, Georgia, and Moldova refused to sign a treaty under any circumstances. Keller, *supra* note 278, at A1, A11.

380. The full text of the draft treaty of March 9, 1991, was published in IZVESTIYA, Mar. 9, 1991, at 2, translated in FBIS-SOV-91-047, Mar. 11, 1991, at 28-33 [hereinafter 1991 Draft Treaty].

381. The referendum was both a tactical move to circumvent the republics' sovereignty-minded governments and an attempt to provide the union with democratic legitimacy. See Bill Keller, *Gorbachev Asks Votes on Unity in the Republics*, N.Y. TIMES, Dec. 18, 1990, at A1; Keller, *supra* note 278, at A1.

382. The referendum was not legally binding. Its legal basis was article 5 of the 1977 Constitution, which stated that "[m]ajor matters of state shall be submitted to nationwide discussion and put to a popular vote." KONST. SSSR art. 5 (1977), translated in Kavass & Christian, *supra* note 123, at 601.

383. Francis X. Clines, *Gorbachev Given a Partial Victory in Voting on Unity*, N.Y. TIMES, Mar. 19, 1991, at A1.

384. Keller, *supra* note 278, at A11.

385. Clines, *supra* note 383, at A1; see also PRAVDA, Mar. 27, 1991, at 1-2 (reporting the results of the referendum), translated in FBIS-SOV-91-061, Mar. 29, 1991, at 32-35.

386. However, some republics added questions to the referendum that adversely affected the goal to "renew" the union. See Clines, *supra* note 383, at A1.

term lacks a clear definition,³⁸⁷ it certainly does not include the entire population of a multinational empire characterized by extreme ethnic, lingual, cultural, and religious diversity. The referendum did not reflect the will of the "people" because it was not an act of self-government of each of the republics.³⁸⁸ However, given that the referendum was not binding, it could not be considered a violation of self-determination. If anything, it was a wishful expression of the voters to preserve the Soviet Union as a union. Only binding referenda, separately held in each republic to decide whether to remain in the federation, would be a genuine expression of self-determination.³⁸⁹ The Baltic republics chose this method when they held plebiscites to determine whether to become independent.³⁹⁰ This would have been the proper mode for equipping a new union with both federated and democratic legitimacy.³⁹¹ However, the developments in the aftermath of the failed coup made it clear that a new union in the form of even a loose federation was no longer possible.

E. Continuing the Negotiations

The referendum's outcome, coupled with the continuing political and economic crisis, spurred attempts to bring the union crisis to an end. Due to strong discontent regarding the lack of republic participation in the drafting procedure, the union was urged to make further concessions. A breakthrough occurred at a secret conference on April 23, 1991, when President Gorbachev and the leaders of the nine

387. See *supra* notes 299-307 and accompanying text.

388. This position is supported by the occasions during and after the process of decolonization when referenda were held to determine the status of territories. It was always the will of a distinct group of people, often a minority, and not the will of a majority or a superior entity, that decided the territories' futures. See HENKIN ET AL., *supra* note 86, at 285-95; HANNUM, *supra* note 104, at 40-42.

389. See G.A. Res. 1541, *supra* note 366, princ. VII ("Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.").

390. See *supra* note 5.

391. James Madison supported this method over 200 years ago, when he described how the United States Constitution should be enacted:

[I]t appears . . . that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but . . . that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State—the authority of the people themselves. The act, therefore, establishing the Constitution will not be a national but a federal act.

THE FEDERALIST No. 39, at 256-57 (James Madison) (I. Kramick ed., 1987).

republics that were willing to remain in the union concluded a political agreement. This so-called Common Statement of the Ten, or Nine Plus One Agreement, stated that a new union treaty among sovereign states was the primary task in overcoming the crisis.³⁹² Subsequently, the union dealt with the republics as equals. Negotiations were conducted between President Gorbachev and the leaders of the nine republics,³⁹³ or between their respective representatives. Thus, the republics truly participated in the negotiations, and they were able to protect their rights of self-determination and sovereignty. On June 22, 1991, a revised version of the 1991 Draft Treaty was published. Further negotiations between representatives of the union and the republics, and a compromise between President Gorbachev and the President of the RSFSR, Boris Yeltsin, led to the publication of a final version, the Revised 1991 Draft Treaty.³⁹⁴

F. The Position of the Republics That Were Unwilling to Sign a New Union Treaty

The Common Statement of the Ten not only acknowledged and confirmed the claims of sovereignty by the republics, but also recognized "the right of Latvia, Lithuania, Estonia, Moldova, Georgia and Armenia to independently decide on the question of accession to the Union Treaty."³⁹⁵ Although politically important, legally, this statement only confirmed the existing law. Sovereignty, as well as the concept of contract, implied the freedom to conclude or not conclude agreements. Thus, republics unwilling to adhere to a new union treaty could not legally be forced to ratify.³⁹⁶

Questions arose as to the future legal position of these republics and the legal basis of their relations with the members of the new union. Some statements by union representatives in 1990 expressed the opinion that the 1922 Union Treaty would have continuing validity for the republics not signing a new union treaty.³⁹⁷ Thus, in order

392. See Serge Schmemmann, *A Cease-Fire of Chieftains*, N.Y. TIMES, Apr. 25, 1991, at A1; see also Vladimir Isachenkov, *Gorbachev on Joint Statement with Leaders*, MOSCOW TASS, Apr. 26, 1991, translated in FBIS-SOV-91-082, Apr. 29, 1991, at 27-28.

393. See Isachenkov, *supra* note 392, at 27.

394. Revised 1991 Draft Treaty, *supra* note 9; see also Lloyd & Freeland, *supra* note 9, at 1.

395. *Soviet Excerpts: Accord with the Republics*, N.Y. TIMES, Apr. 25, 1991, at A6.

396. Vienna Convention on the Law of Treaties, *supra* note 71, art. 52. Article 52 states that a treaty is void if concluded under the threat or use of force. *Id.*

397. See Sheehy, *supra* note 370, at 5. The same conclusion may also be drawn from the wording of article 22 of the 1990 Draft Treaty and article 23 of the 1991 Draft Treaty. See

to secede, they would have had to exercise their "right" of secession under the controversial 1990 secession law.³⁹⁸ The rationale underlying this view was that a new union treaty between some of the republics constituted a modification of the 1922 Union Treaty, and, given the old treaty's continuing validity, the republics that were unwilling to adhere to the new union treaty were still bound by the old one.

The consequences of this interpretation would have been absurd. There would have been two unions, one based on the 1922 Union Treaty, and the other based on the new treaty. Different laws and institutions would have existed under each of them. The 1991 Draft Treaty attempted to clarify the position of nonsignatory republics, by stating that the "[r]elations between the Union and the republics which have not signed the Union Treaty shall be regulated on the basis of the existing USSR legislation and mutual commitments and agreements."³⁹⁹ But, given that both the 1990 and 1991 draft treaties designed a much looser union than the 1922 Union Treaty, republics unwilling to remain in any union would have been held captive by the strict socialist framework of the 1922 Union Treaty. Both politically and practically, the survival of such a construction was inconceivable.⁴⁰⁰

The nonsignatory republics could have invoked the following legal arguments against the continuing validity of the 1922 Union Treaty. First, they could have argued that a fundamental and unforeseeable change in circumstances made it impossible for them to perform their legal obligations under the 1922 Union Treaty.⁴⁰¹ Second, the republics could have claimed that the purposes and the economic, political, and ideological foundations of the treaties were incompatible. Third, they could have argued that, as a consequence, the conclu-

1990 Draft Treaty, *supra* note 375, art. 22 ("The Union Treaty comes into force from the moment of its signing. The 1922 Treaty on the Formation of the Union of Soviet Socialist Republics will be deemed to have lapsed as of the same date for the republics which have signed it."); 1991 Draft Treaty, *supra* note 380, art. 23.

398. See *supra* notes 315, 359 and accompanying text.

399. 1991 Draft Treaty, *supra* note 380, arts. 23, 33, translated in FBIS-SOV-91-047, *supra* note 380, at 33.

400. See Sheehy, *supra* note 370, at 5.

401. They could have done this by invoking *rebus tuc stantibus*. See Vienna Convention on the Law of Treaties, *supra* note 71, art. 62, § 1. This basic change would have consisted of (1) the fact that the ideological foundation of the 1922 Union Treaty was no longer valid; (2) a fundamental political and economic change in the Soviet Union as a whole; and (3) the fact that some republics concluded a new union treaty, thus creating a completely new situation. The continuing validity of the 1922 Union Treaty was, in fact, a fiction that could not have been upheld.

sion of a new union treaty implicitly terminated the 1922 Union Treaty as a whole, and that the republics could not be bound by the old treaty against their will.⁴⁰² Finally, the republics could have contended that sovereignty and self-determination of the nonsignatory republics excluded their involuntary membership in the union.

Even before the failed coup, there was only one reasonable legal conclusion as to the position of the nonsignatory Soviet republics: they would become sovereign, independent states once the new union treaty entered into force. Even at that time, redefining the union's equilibrium implied that some of the republics would no longer be part of the union. The legal and political ties between the nonsignatory republics and the Soviet Union would have been governed by international law, as the revised 1991 Draft Treaty acknowledged.⁴⁰³

VI. AN EMERGING CONFEDERATION IN THE PRE-COUP DRAFT UNION TREATIES

A. Preliminary Remarks

The Soviet republics' power gains were already reflected in the draft union treaties published before the failed coup. These treaties broke with the concept of socialist federalism set forth in the 1977 Constitution and its predecessors. Further, they were a reliable indicator of how the new union equilibrium would appear. The 1991 Draft Treaty served as the starting point for negotiations between the leaders of the republics and the union,⁴⁰⁴ and was the basis for the revised version published in June 1991.⁴⁰⁵ All of the drafts were structured similarly,⁴⁰⁶ and had common basic features regarding the union's structure. Moreover, they all reflected the power shift that occurred in the Soviet Union between 1988 and August 1991.

402. Termination of a treaty by concluding a later treaty requires the consent of the parties. *Id.* arts. 41, 59. The secession-minded republics certainly would have agreed to terminate the 1922 Union Treaty if they considered its continuing validity a fiction. The new union treaty could not have validly imposed obligations on these republics without their consent. *See id.* art. 35.

403. *See* Lloyd & Freeland, *supra* note 9, at 1.

404. According to Supreme Soviet Chairman Anatoly I. Lukyanov, two republics submitted their own drafts. *See Interview with Anatoly I. Lukyanov, supra* note 364, at 33.

405. *See supra* note 9.

406. All of the drafts included the following: (1) basic principles; (2) the structure of the union; (3) the organs of the union; and (4) concluding provisions. *See generally* 1990 Draft Treaty, *supra* note 375; 1991 Draft Treaty, *supra* note 380; Revised 1991 Draft Treaty, *supra* note 9.

B. Survival of the Basic Features of Lenin's Concept of Federalism

The main features of Lenin's concept of federalism⁴⁰⁷ survived in the draft treaties. A central concept in the draft treaties was the voluntary nature of a federation based on the principle of self-determination.⁴⁰⁸ Moreover, the draft treaties reflected the idea that a federation must be based on a union treaty to protect the union members' sovereignty. Additionally, they endorsed the concept of a bicameral legal system consisting of a treaty embodying the union's federated legitimacy and a constitution establishing the actual system of government. However, the essential document was the draft treaty, which elaborated the union's political and economic foundations comprehensively. It was designed to be the foundation of the union, whereas the constitution was to play a relatively minor role. Therefore, the draft treaty was not designed to be a mere merger agreement. Its legal validity was to survive the promulgation of the constitution. Most constitutional changes would have necessitated a corresponding amendment to the union treaty, done only with each republic's consent.⁴⁰⁹ This consent requirement, which was more stringent than that of the United Nations Charter,⁴¹⁰ emphasized the contractual and republic-dominated nature of the planned new union.

Another aspect of the voluntary nature of the union was the right to secede. Although the 1990 Draft Treaty did not mention this right specifically, it described membership in the union as voluntary.⁴¹¹ Thus, it retained the right to secede, which had been a basic feature of the 1922 Union Treaty and all of the socialist constitutions since 1924.⁴¹² In contrast, the 1991 Draft Treaty expressly recognized the republics' right to secede.⁴¹³ Yet, neither the constitutions nor the

407. See *supra* notes 106-16 and accompanying text.

408. The right of self-determination of nations and peoples was mentioned in both the preamble to the 1991 Draft Treaty and the Revised 1991 Draft Treaty. In addition, the 1990 Draft Treaty acknowledged this right. See 1990 Draft Treaty, *supra* note 375; 1991 Draft Treaty, *supra* note 380; Revised 1991 Draft Treaty, *supra* note 9.

409. See 1991 Draft Treaty, *supra* note 380, art. 24; 1990 Draft Treaty, *supra* note 375, art. 23.

410. According to article 108 of the United Nations Charter, amendments to the Charter come into force for all members of the United Nations after they have been adopted by a two-thirds majority of the General Assembly and ratified by two-thirds of the members, including all permanent members of the Security Council. U.N. CHARTER art. 108.

411. 1990 Draft Treaty, *supra* note 375, art. 1, § 1.

412. Voluntary union membership necessarily granted every republic the right to leave the union. See Sheehy, *supra* note 370, at 5.

413. See 1991 Draft Treaty, *supra* note 380, art. 1, § 5. The Revised 1991 Draft Treaty also recognized the right to secede, but deferred to the constitution regarding the method of

draft treaties specified the conditions under which a territory could leave the union.⁴¹⁴

C. *Sovereignty of the Republics as the Basis for the New Union*

The preamble to the Revised 1991 Draft Treaty declared that "[t]he states that have signed the present treaty, proceeding from the declarations of state sovereignty . . . have decided to build their relations within the Union upon new principles"⁴¹⁵ Like the 1977 Constitution, the draft treaties acknowledged the Soviet republics' sovereignty. The republics as entities, and not their citizenry, represented the basic units upon which the new union would have been built. This scheme carried with it four major implications for the distribution of power in the union.

First, the republics' sovereignty represented the doctrinal basis of the union, its starting point, and its major source of power.⁴¹⁶ This was reflected not only in the name of the future union, "Union of Soviet Sovereign Republics,"⁴¹⁷ but also in the basic principles, which described the republics as sovereign states.⁴¹⁸ The republics vested the union with the minimal power necessary to govern the union, but retained all other powers.⁴¹⁹ Thus, the draft treaties adhered to the

secession. See Revised 1991 Draft Treaty, *supra* note 9, art. 1, § 5. The provisions in the 1990 Draft Treaty providing for the possible expulsion of a member state that violated the treaty and its commitments considerably increased the potential for disintegration of the union. See 1990 Draft Treaty, *supra* note 375, art. 1, § 4.

414. See Sheehy, *supra* note 370, at 5. Article 1, section 5 of the 1991 Draft Treaty left this question open to resolution by the parties to the treaty. The Revised 1991 Draft Treaty referred to the constitution to decide the method of unilateral secession. See *supra* note 413.

415. Revised 1991 Draft Treaty, *supra* note 9, pmbl., translated in FBIS-SOV-91-124, *supra* note 9, at 26-27; see Lloyd & Freeland, *supra* note 9, at 3. The wording of the preambles to the 1991 and 1990 draft treaties was similar in this respect, but they spoke of "republics" instead of "states." See 1991 Draft Treaty, *supra* note 380, pmbl.; 1990 Draft Treaty, *supra* note 375, pmbl.

416. The 1991 Draft Treaty began: "The sovereign republics parties to the Treaty, expressing their peoples' will to renew the Union . . . proceeding from the declarations of state sovereignty proclaimed by the republics . . . have resolved to build their relations on new principles within a Union of Soviet [S]ocialist Republics (USSR)." 1991 Draft Treaty, *supra* note 380, pmbl., translated in FBIS-SOV-91-047, *supra* note 380, at 28. The Revised 1991 Draft Treaty substituted the term "socialist" for "sovereign." See Revised 1991 Draft Treaty, *supra* note 9, pmbl.

417. See Revised 1991 Draft Treaty, *supra* note 9, pmbl.; 1991 Draft Treaty, *supra* note 380, pmbl.; 1990 Draft Treaty, *supra* note 375, pmbl.

418. See 1991 Draft Treaty, *supra* note 380, first basic princ.; 1990 Draft Treaty, *supra* note 375, first basic princ.

419. See 1991 Draft Treaty, *supra* note 380, first basic princ.; 1990 Draft Treaty, *supra* note 375, first basic princ.

principles of enumerated and subsidiary powers.⁴²⁰

Second, the vertical allocation of government powers reflected an increase in the republics' sovereignty and power. Where the 1990 Draft Treaty allocated these powers primarily to the union,⁴²¹ the 1991 Draft Treaty favored republic sovereignty and created three jurisdictional levels: (1) exclusively union; (2) jointly union and republic; and (3) exclusively republic.⁴²² Within this structure, the union's exclusive jurisdiction was narrowly defined and was limited to certain aspects of foreign affairs, foreign economic activities, military, defense, and state security.⁴²³ Other aspects of these areas were subject to joint jurisdiction, such as social welfare, economics, environmental protection, education, and research.⁴²⁴ Moreover, the union's powers were limited to defining basic principles and policies,⁴²⁵ and all other powers belonged to the republics. Since any change in the vertical power structure required an amendment to the union treaty, the republics' powers were protected sufficiently. The Revised 1991 Draft Treaty further limited the center's power, confining it to joint power over defense, foreign affairs, the union budget, communication, and transportation.⁴²⁶

Third, the republics' increased sovereignty affected the union's proposed system of government. The fundamental goal of this scheme was the republics' broad participation in the union.⁴²⁷ To achieve this goal, the bicameral Supreme Soviet was to be the exclusive legislature,⁴²⁸ with the Soviet of the Republics serving as its upper

420. See *supra* note 60.

421. The central jurisdictional powers ranged from defense, military, foreign affairs, foreign economic relations, customs, economics, and the monetary system, to social welfare, social security, environmental protection, public transportation, communication, and energy. See 1990 Draft Treaty, *supra* note 375, art. 5. Some of the powers in areas that the republics consider sensitive, such as economics, social welfare, and property ownership, were to have been exercised jointly by the republics and the union. This would have resulted in problems of vertical policy coordination and power allocation, which the draft did not settle. In addressing this issue, the 1990 Draft Treaty created special organs, mechanisms, and procedures to overcome the coordination problem. However, it did not define them, so the extent of the republics' powers in the areas of joint jurisdiction was unclear. See *id.* art. 6.

422. 1991 Draft Treaty, *supra* note 380, art. 1.

423. *Id.* art. 5, § 1.

424. *Id.* art. 5, § 2.

425. *Id.*

426. See Revised 1991 Draft Treaty, *supra* note 9, art. 6.

427. See 1990 Draft Treaty, *supra* note 375, art. 10 ("Union organs of power and administration are constituted on the basis of broad representation of the republics . . ."), translated in FBIS-SOV-90-227, *supra* note 375, at 41; see also 1991 Draft Treaty, *supra* note 380, art. 11.

428. The often criticized USSR Congress of People's Deputies was to be abolished. 1991

chamber, and the Soviet of the Union serving as its lower and less powerful chamber.⁴²⁹ Further, the Soviet of the Republics was to be composed of an equal number of representatives from each republic, similar to the United States Senate.⁴³⁰ This structure was designed to enhance republic participation in the legislative process.

Fourth, the positions of the union's president and vice president depended on the support of a majority of the republics. In particular, these union officials were to be elected for a maximum of two successive five-year terms. A majority vote of the citizens of the entire union, as well as a majority of the republics, would have been required, thus preventing major political antagonisms between the republics and the president.⁴³¹ This requirement was particularly important, as the president headed the union state, exercised supreme executive and administrative power, monitored observation of the union treaty, the USSR Constitution, and laws, and commanded the armed forces.⁴³² Furthermore, the president was to lead the Federation Council composed of the presidents of the several republics.⁴³³ In contrast, the Cabinet of Ministers was to be composed of a prime minister, deputy prime ministers, union ministers, leaders of other union organs,⁴³⁴ and the leaders of the republics' governments.⁴³⁵

Draft Treaty, *supra* note 380, art. 12; 1990 Draft Treaty, *supra* note 375, art. 11; *see also* Sheehy, *supra* note 370, at 5.

429. The 1991 Draft Treaty did not elaborate on the superior position of the Soviet of the Republics. The nationalities were granted representation in the bicameral Supreme Soviet of the Union, but not explicitly in the Soviet of the Republics. *See* 1991 Draft Treaty, *supra* note 380, art. 12, § 4. The regulation in the Revised 1991 Draft Treaty was similar. *See* Revised 1991 Draft Treaty, *supra* note 9, art. 13.

430. 1991 Draft Treaty, *supra* note 380, art. 12, § 2. According to the Revised 1991 Draft Treaty, this body would have been composed of delegates from the republic parliaments. Revised 1991 Draft Treaty, *supra* note 9, art. 13, § 2.

431. *See* 1990 Draft Treaty, *supra* note 375, art. 12; 1991 Draft Treaty, *supra* note 380, art. 13, § 3. The Revised 1991 Draft Treaty was identical in this respect. *See* Revised 1991 Draft Treaty, *supra* note 9, art. 14, § 3. The majority requirement may have been difficult to achieve and may have had a destabilizing impact if no qualified candidate was found.

432. 1991 Draft Treaty, *supra* note 380, art. 13; 1990 Draft Treaty, *supra* note 375, art. 12.

433. According to the 1990 Draft Treaty, the Council

effects coordination and agreement of the activity of supreme organs of state power and administration of the Union and the republics, oversees . . . observance of the Union Treaty, determines measures for the implementation of the Soviet state's nationalities policy, ensures the republics' participation in solving questions of unionwide importance, and elaborates recommendations for the resolution of disputes and the settlement of conflict situations in interethnic relations.

1990 Draft Treaty, *supra* note 375, art. 14, *translated in* FBIS-SOV-90-227, *supra* note 375, at 41-42. The 1991 Draft Treaty described its function as more coordinative. *See* 1991 Draft Treaty, *supra* note 380, art. 15.

434. 1991 Draft Treaty, *supra* note 380, art. 16; 1990 Draft Treaty, *supra* note 375, art. 15.

The republics' participation in the Federation Council may have enabled them to influence the union government's policy. However, the extent of the Federation Council's powers was unclear. While this structure offered potential benefits to the republics, it may have created problems. For example, an executive branch consisting of the president, the Federation Council, and the Cabinet of Ministers may have created rivalries and confusion over political responsibilities. The efficiency of the Federation Council and the Cabinet of Ministers would have depended on the support of the republics' governments, which may have been preoccupied with domestic affairs.⁴³⁶ Consequently, the president, as head of state, would have possessed ultimate authority, since he or she would have had the supreme executive powers, including emergency powers.⁴³⁷

Finally, the draft treaties gave the Soviet republics an important role in implementing union law through mechanisms designed to protect their rights.⁴³⁸ Since the union government would have been partially dominated by republic representatives, the Soviet republics would have had considerable implementation powers. These draft treaties addressed the republics' concerns about the creation of an overly powerful central bureaucracy with an ability to suppress the republics' sovereignty. While the Union Prosecutor's Office would have had primary enforcement responsibility, the republics' attorney generals, elected by the republics' parliaments,⁴³⁹ would have been members of the union collegium and would have exercised some control.⁴⁴⁰

D. *The Supremacy Problem: Dual Sovereignty*

Legal disintegration and enforcement crises have been paramount problems in the Soviet Union since 1988. Supremacy of the union's legal order would have been crucial in restoring its legal system and ensuring the implementation and enforcement of its laws.

435. See 1991 Draft Treaty, *supra* note 380, art. 15 (granting voluntary membership with the right to vote); 1990 Draft Treaty, *supra* note 375, art. 16 (granting *ex officio* membership).

436. See Sheehy, *supra* note 370, at 4-6. This may be why the 1991 Draft Treaty only provided for voluntary membership of the republic governments in the Cabinet of Ministers. See 1991 Draft Treaty, *supra* note 380, art. 16, § 2.

437. 1991 Draft Treaty, *supra* note 380, art. 13, § 1; 1990 Draft Treaty, *supra* note 375, art. 12.

438. See 1991 Draft Treaty, *supra* note 380, art. 6; 1990 Draft Treaty, *supra* note 375, art. 6.

439. See 1991 Draft Treaty, *supra* note 380, art. 19, § 3.

440. See *id.*; 1990 Draft Treaty, *supra* note 375, art. 18.

Supremacy determines whether the central government or the republics decide the Soviet Union's future. It is the embodiment of the *Grundnorm*⁴⁴¹ and the *Kompetenzkompetenz*.⁴⁴² Thus, supremacy of the union's legal order required concessions regarding the republics' declarations of sovereignty, which were intended to change the balance of power.

The Soviet republics were unwilling to take this decisive step back. Their hesitancy was reflected in the way that the draft treaties addressed supremacy. The 1991 Draft Treaty stated that the union treaty was the country's supreme law⁴⁴³ and the basis of the USSR Constitution.⁴⁴⁴ The constitution, which was second in rank,⁴⁴⁵ was adopted by a special vote of the republics' representatives.⁴⁴⁶ Yet, the constitution was supreme in the sense that it could not be contravened by the republics' laws.⁴⁴⁷ The same was true with regard to union laws in their narrowly defined sphere of the constitution's exclusive jurisdiction.⁴⁴⁸ Less clear was the position of the union laws in the area of joint jurisdiction, which embraced most of the union's powers. A Soviet republic was entitled to object to any union law that allegedly impaired its interests,⁴⁴⁹ and it could therefore prevent the law's implementation in its territory. Moreover, a republic could challenge any union law violating its own constitution and laws, provided that the republic laws were not *ultra vires*.⁴⁵⁰ Thus, a simple objection to union laws, or a change in a republic's laws, was sufficient to challenge the union's authority by threatening the union with awkward conciliation or legal procedures,⁴⁵¹ and potential legal disintegration.⁴⁵² Such a scheme could not resolve the issue of supreme author-

441. See *supra* note 151.

442. See *supra* text accompanying note 65.

443. The constitutions and laws of both the union and Soviet republics had to comply with the union treaty. See 1991 Draft Treaty, *supra* note 380, arts. 9, § 3, 10, § 1.

444. *Id.* art. 9, § 1.

445. The constitution could not contravene the union treaty. *Id.* art. 9, § 3.

446. *Id.* art. 9, § 2.

447. See *id.* art. 10, § 1 (stating that union laws are supreme as long as they are not *ultra vires*). The union had the power to challenge republic laws not complying with union laws by bringing the case before the USSR Constitutional Court. *Id.* art. 10, § 5.

448. *Id.* art. 10, § 2. These laws could not infringe the union treaty. *Id.* art. 10, § 1.

449. *Id.* art. 10, § 4.

450. *Id.* art. 10, § 5.

451. *Id.*; see also 1990 Draft Treaty, *supra* note 375, art. 9, § 5.

452. Interpublic compact posed another challenge to union supremacy, as they expressed the genuine sovereignty of the republics. Such compacts were allowed if they did not infringe upon the union treaty. See 1991 Draft Treaty, *supra* note 380, art. 4, § 1.

ity within the union. Only the union treaty and the constitution based on the union treaty were supreme. Exceptions to the supremacy principle gave the republics important discretionary powers to accept or reject union laws.⁴⁵³ Thus, these laws could not be regarded as supreme.

This scheme must be examined against the concept of dual sovereignty, a system of power-sharing with two power centers holding similar and autonomous authority. The draft treaties incorporated the concept of dual sovereignty by (1) labeling both the Soviet republics and the union as sovereign;⁴⁵⁴ (2) allowing the republics to maintain important areas of exclusive jurisdiction; (3) requiring unanimity or a majority of the republics to approve union action, implement the union's power, or change the union's basic legal framework;⁴⁵⁵ (4) providing the republics with either a veto power or consent requirement for most of the union laws;⁴⁵⁶ (5) giving the Soviet republics a considerable role in the union government;⁴⁵⁷ (6) excluding important issues, such as redrawing borders between republics, from the union's jurisdiction;⁴⁵⁸ and (7) preferring coordinative and political mechanisms for solving conflicts between the union and republics.⁴⁵⁹ Such a framework indicated that the Soviet republics had at least equal, if not

453. See *id.* art. 10; 1990 Draft Treaty, *supra* note 375, art. 9.

454. The first basic principle of the 1990 Draft Treaty declared: "The USSR is a sovereign federal [democratic] state formed as a result of a voluntary association of [equal] republics and exercising state power within the limits of the powers vested in it by the parties to the Treaty." 1990 Draft Treaty, *supra* note 375, first basic princ., translated in FBIS-SOV-90-227, *supra* note 375, at 39; see also 1991 Draft Treaty, *supra* note 380, first basic princ. (adding terms in brackets). The Revised 1991 Draft Treaty emphasized the republics' sovereignty even more. See Revised 1991 Draft Treaty, *supra* note 9, first basic princ.; Lloyd & Freeland, *supra* note 9, at 3.

455. See, e.g., 1991 Draft Treaty, *supra* note 380, arts. 5-6, 24; 1990 Draft Treaty, *supra* note 375, arts. 5-6, 23.

456. 1991 Draft Treaty, *supra* note 380, art. 10; 1990 Draft Treaty, *supra* note 375, art. 9.

457. 1991 Draft Treaty, *supra* note 380, arts. 11-16; 1990 Draft Treaty, *supra* note 375, arts. 10-15.

458. 1991 Draft Treaty, *supra* note 380, art. 3, § 3; 1990 Draft Treaty, *supra* note 375, art. 3, § 2. Changes of borders between republics were made possible by simple agreements between republics; the union did not play a role. See 1991 Draft Treaty, *supra* note 380, art. 1, § 3; 1990 Draft Treaty, *supra* note 375, art. 1, § 2.

459. The USSR Supreme Soviet, the Council of Federation, or the Cabinet of Ministers would have solved most issues. With regard to the crucial problems of contradictory union and republic laws, legal disputes among republics, or controversies between republics and the union, the 1991 Draft Treaty provided for either conciliation or litigation before the USSR Constitutional Court. See 1991 Draft Treaty, *supra* note 380, art. 10, § 5; see also 1990 Draft Treaty, *supra* note 375, art. 16 (stating that "[t]he USSR Constitutional Court monitors the compliance of USSR and republican laws with the Union Treaty and the USSR Constitution, and resolves disputes between republics or between the Union and republics in the event that

prevailing, power over the union. Therefore, it was not surprising that the draft treaties did not decide the supremacy issue conclusively.

E. The Soviet Republics' Position in the World Community

The concept of dual sovereignty also affected the way in which the draft treaties addressed the Soviet republics' position in the world community. Even at the time the treaties were drafted, it was foreseeable that all of the republics would play an autonomous role in international politics. The Revised 1991 Draft Treaty explicitly described the republics as "full members of the international community,"⁴⁶⁰ which could conduct foreign affairs, as long as they did not infringe upon the union treaty, the interests of the other republics, or the Soviet Union's international commitments.⁴⁶¹ The Revised 1991 Draft Treaty reduced the union's powers in the areas of foreign policy, defense, and the military.⁴⁶² Similarly, the 1991 Draft Treaty gave the union only limited power over the republics' participation in foreign relations.⁴⁶³ By acknowledging the republics' statehood in the international arena, the union forfeited the legal and political monopoly it

such disputes have not been successfully settled via conciliation procedures"), translated in FBIS-SOV-90-227, *supra* note 375, at 42.

460. Revised 1991 Draft Treaty, *supra* note 9, seventh basic princ., translated in FBIS-SOV-91-124, *supra* note 9, at 27. The 1991 Draft Treaty used identical wording. See 1991 Draft Treaty, *supra* note 380, seventh basic princ.

461. See Revised 1991 Draft Treaty, *supra* note 9, seventh basic princ. The 1991 Draft Treaty prohibited infringements upon "the interests of the parties to the present treaty and their common interests or [those] violating the USSR's international commitments." 1991 Draft Treaty, *supra* note 380, seventh basic princ., translated in FBIS-SOV-91-047, *supra* note 380, at 29. This provision protected the interests of the republics, but not the union, as it was not a party to the union treaty. The republics' foreign affairs powers under the 1991 Draft Treaty included (1) direct diplomatic, consular, and trade relations with foreign countries; (2) treaty making power; and (3) participation in international organizations. See *id.* The wording of the Revised 1991 Draft Treaty was similar. See Revised 1991 Draft Treaty, *supra* note 9, seventh basic princ.; Lloyd & Freeland, *supra* note 9, at 3.

462. Under the 1991 Draft Treaty, foreign, military, and defense policies were within the common jurisdiction of the union and Soviet republics. See 1991 Draft Treaty, *supra* note 380, art. 5, § 2. The Revised 1991 Draft Treaty was similar. See Revised 1991 Draft Treaty, *supra* note 9, art. 5; Lloyd & Freeland, *supra* note 9, at 1. Under the 1990 Draft Treaty, only the union had the attributes of statehood necessary for international recognition and conduct of foreign relations. Defense of sovereignty and territorial integrity, the military, foreign affairs, and treaty making power were all powers of the union. See 1990 Draft Treaty, *supra* note 375, art. 5, § 3.

463. Union power in foreign affairs was limited to implementing unionwide issues. The union could also coordinate union and republic foreign policies. See 1991 Draft Treaty, *supra* note 380, art. 5. However, it could not monitor republic conduct of foreign affairs as long as the republics did not infringe upon the union treaty's scheme of vertical allocation of powers. See *id.*

had enjoyed. This acknowledgment concerned the world community and raised important political and legal issues, such as (1) who represented the union in international organizations, such as the United Nations and the Security Council;⁴⁶⁴ (2) who was primarily responsible and liable under international law; (3) who could conduct foreign affairs and, in particular, make treaties;⁴⁶⁵ and (4) whether the Soviet republics would fulfill the prerequisites for recognition of statehood under international law.

International law has its own requirements for recognizing an entity's statehood.⁴⁶⁶ The union treaty's acknowledgment of the republics' statehood could not be a substitute for international recognition of the Soviet republics as independent states. The issue of whether the republics would become members of the world community depended on the ties that the new union treaty would have established. Countries within the EC are regarded as members of the international community, even though they have delegated some power to a governing body with its own foreign policy and treaty making capacity.⁴⁶⁷ Thus, the existence of a new Soviet Union would not have per se excluded recognition of the Soviet republics as states. The end of the Soviet Union as a state and the creation of the CIS resolved these issues.

F. Other Features of the Pre-Coup Draft Treaties

Nationality and interrepublic relations were two other issues of importance to the Soviet Union. The complex nationality problem affected the Soviet Union's structure significantly. The existence of

464. According to the seventh basic principle of the Revised 1991 Draft Treaty, the republics had the right to participate in international organizations. See Revised 1991 Draft Treaty, *supra* note 9, seventh basic princ.; Lloyd & Freeland, *supra* note 9, at 3.

465. The Revised 1991 Draft Treaty gave the republics treaty making power as long as they did not infringe upon the union's international obligations or the interests of other republics. See Revised 1991 Draft Treaty, *supra* note 9, art. 4, § 1; Lloyd & Freeland, *supra* note 9, at 3. In comparison, article 46 of the Vienna Convention on the Law of Treaties states that only manifest, objectively evident violations of fundamental parts of a state's law entitle that state not to be bound by an international agreement concluded in violation of its internal law. Vienna Convention on the Law of Treaties, *supra* note 71, art. 46. Therefore, it is in every state's interest to establish clear rules regarding the republics' treaty making power. Given the unclear allocation of treaty making power between the union and the republics, confusion in the international community arose over internal allocations of power and responsibility.

466. See *supra* note 340 and accompanying text.

467. With regard to the treaty making power of the EC, see Case 22/70, Commission v. Council, 17 E.C.R. 263 (1971), which states that whenever the EC adopts either a common policy or rules and measures, the member states can no longer undertake obligations with third countries that affect the EC's policy.

Russians and other ethnic minorities in non-Russian republics, as well as the significant non-Russian population within Russia, connected the Soviet republics.⁴⁶⁸ However, the pre-coup draft treaties failed to address this basic issue adequately. Substantive legal protection of minorities and nationalities against republic and majority domination was weak,⁴⁶⁹ and lacked an efficient dispute resolution mechanism. The procedures available for settling nationality disputes were primarily political, and were usually neither binding nor legal.⁴⁷⁰ Nationality issues were regarded as being within the province of the Soviet republics, not the union. Similarly, the draft treaties did not provide effective mechanisms for regulating interrepublic relations. The drafts referred solely to international law, both in their terminology⁴⁷¹ and in their substantive regulations.⁴⁷² In the interrepublic

468. See Brzezinski, *supra* note 1, at 6-8.

469. There were no provisions granting minorities and nationalities comprehensive legal protection in the draft treaties. Rather, the 1990 Draft Treaty only mentioned the international instruments on human rights, and stated that the republics "recognize the inalienable right of every people to self-determination, self-government, and the autonomous resolution of all questions of its development. They will resolutely oppose racism, chauvinism, [and] nationalism" 1990 Draft Treaty, *supra* note 375, second basic princ., translated in FBIS-SOV-90-227, *supra* note 375, at 39. Additionally, it stated that the republics "guarantee political rights and opportunities for socioeconomic and cultural development to all peoples living on their territory." *Id.* art. 3, § 3, translated in FBIS-SOV-90-227, *supra* note 375, at 40. The wording of the 1991 Draft Treaty was almost identical. See 1991 Draft Treaty, *supra* note 380.

470. According to both the 1990 and 1991 draft treaties, relations between republics, one of which forms part of the other, were regulated by mutual consent. According to the 1990 Draft Treaty, the Council of the Federation "determines measures for the implementation of the Soviet state's nationalities policy." 1990 Draft Treaty, *supra* note 375, art. 14, § 2, translated in FBIS-SOV-90-227, *supra* note 375, at 41-42. The 1991 Draft Treaty deleted this provision. Hence, the draft treaties heavily relied on political problem solving procedures and majoritarian decisions, which were hardly adequate to protect minorities. The lack of any legal procedures to safeguard minorities' rights was striking, considering the minority and ethnic problems that existed in the Soviet Union.

471. The preambles and basic principles of the draft treaties addressed the issues of sovereignty, self-determination, self-government, and international declarations on human rights. See Revised 1991 Draft Treaty, *supra* note 9; 1991 Draft Treaty, *supra* note 380; 1990 Draft Treaty, *supra* note 375.

472. See, e.g., 1990 Draft Treaty, *supra* note 375, art. 4 (regulating the relations between the Soviet republics in a manner similar to the United Nations and Helsinki charters: "The republics parties to the Treaty build their mutual relations within the Union on the basis of equality, respect for sovereignty, territorial integrity, noninterference in internal affairs, resolution of all disputes by peaceful means, cooperation, mutual assistance, and conscientious fulfillment of commitments under the Union Treaty and interrepublican agreements."), translated in FBIS-SOV-90-227, *supra* note 375, at 40. To this wording, the 1991 Draft Treaty added: "It is incumbent on the republics party to the treaty not to use force or the threat of force against one another, not to commit any acts of violence, and not to infringe other republics' territorial integrity." 1991 Draft Treaty, *supra* note 380, art. 4, translated in FBIS-SOV-91-047, *supra*

arena, the main legal sources were international law and interrepublic agreements, rather than the union's laws.⁴⁷³ Thus, international and domestic law both served as a framework for the prospective union. Moreover, the draft treaties failed to provide binding dispute settlement mechanisms for solving interrepublic issues. The USSR Constitutional Court would have monitored observance of the union treaty and the constitutionality of all republic and union laws, including disputes arising among republics or between a republic and the union.⁴⁷⁴ However, the court's powers would not have included resolving any nonlegislative interrepublic disputes. The omission of binding political procedures to settle interrepublic conflicts would have adversely impacted the union's stability, given the border disputes among republics⁴⁷⁵ and nationality conflicts.

Human rights were also important to the stability of a new union. Protection of human and political rights, as the European Convention for the Protection of Human Rights and Fundamental Freedoms⁴⁷⁶ demonstrates, may be an integrative force enhancing a renewed union's legitimacy. The draft treaties referred to human rights as a "basic principle," but they lacked a comprehensive bill of rights clearly imposing limits on state power. Instead, the draft treaties referred to international instruments on human rights, which define these rights imprecisely.⁴⁷⁷ The union's role in safeguarding citizens' rights and basic freedoms was unclear.⁴⁷⁸ Although the draft

note 380, at 29-30. These principles reflect principles I through VI of the Final Act. See Final Act, *supra* note 304, princ. I-IV.

473. See 1991 Draft Treaty, *supra* note 380; 1990 Draft Treaty, *supra* note 375.

474. See 1991 Draft Treaty, *supra* note 380, art. 17.

475. Under the 1991 Draft Treaty, republics would have recognized the existing borders between them. See *id.* art. 3, § 2.

476. Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221.

477. See, e.g., 1990 Draft Treaty, *supra* note 375, third basic princ. This basic principle stated:

The republics recognize as a most important principle of their association the primacy of human rights, proclaimed in the UN Universal Declaration and in international pacts. Citizens of the USSR are guaranteed the opportunity to study and use their native language, unhampered access to information, freedom of religion, and other political and personal freedoms.

Id., translated in FBIS-SOV-90-227, *supra* note 375, at 39. The 1991 Draft Treaty contained virtually identical language, but it added socioeconomic and individual rights and freedoms to the list of protected rights. See 1991 Draft Treaty, *supra* note 380, third basic princ. The Revised 1991 Draft Treaty was even less specific. See Revised 1991 Draft Treaty, *supra* note 9, third basic princ.; Lloyd & Freeland, *supra* note 9, at 3.

478. According to article 5 of the 1991 and 1990 draft treaties, the guarantee of basic rights and freedoms to Soviet citizens was a joint power of the union and republics. Human rights would most likely have been endorsed in the new constitution and monitored by the

treaties recognized the importance of the "common fundamental principle of democracy based on popular representation, and . . . the creation of a rule-of-law state which would act as guarantor against any tendencies toward authoritarianism and tyranny,"⁴⁷⁹ it remained unclear whether the union could act as the safeguard of a democratic political system in the republics.

A final issue was how the draft treaties addressed the economy. For the Soviet republics and the old union, common economic problems justified renewing the union⁴⁸⁰ and creating an association, even though the republics desired independence.⁴⁸¹ The republics' declarations of economic sovereignty obstructed the formation of an economic community within the union. The Soviet republics' position in economic matters was quite strong, as the union's regulatory

Constitutional Court. See 1991 Draft Treaty, *supra* note 380, art. 5; 1990 Draft Treaty, *supra* note 375, art. 5.

479. 1990 Draft Treaty, *supra* note 375, fifth basic princ., translated in FBIS-SOV-90-227, *supra* note 375, at 39. The 1991 Draft Treaty mentioned "direct expression of the peoples' will" as an additional feature of the political system. 1991 Draft Treaty, *supra* note 380, fifth basic princ., translated in FBIS-SOV-91-047, *supra* note 380, at 29; see also Revised 1991 Draft Treaty, *supra* note 9, fifth basic princ.; Lloyd & Freeland, *supra* note 9, at 3 (discussing the Revised 1991 Draft Treaty).

480. Almost no Soviet republic could have survived in the world market. See M. Buzhkevich, *Turnaround: The USSR President Discussed This*, PRAVDA, Nov. 21, 1990, at 1, 1-2 (interview with USSR Supreme Soviet Presidium member A. Denisov), translated in FBIS-SOV-90-228, Nov. 27, 1990, at 48-50. The draft treaties referred to the economy as a common responsibility of the republics. See 1991 Draft Treaty, *supra* note 380, pmbl.; 1990 Draft Treaty, *supra* note 375, pmbl. Creating an economic community was the defining feature of the Shatalin Plan, which wanted to transform the Soviet Union into an economic confederation akin to the EC. Under the plan, member states would have transferred limited powers to the center by creating a supra-republican structure, governed through an Interrepublic Economic Committee. See Ed A. Hewett, *The New Soviet Plan*, 69 FOREIGN AFF. 146, 149 (1990). The plan further provided for an all-union market without internal barriers to trade, a central bank system similar to the United States Federal Reserve, a single currency, and a single tariff system. *Id.*

481. Negotiations on an economic agreement with almost all of the 15 republics were planned before the failed coup took place. See Lloyd & Freeland, *supra* note 9, at 1. Representative Bronshtein, an Estonian representative in the USSR Supreme Soviet and member of the Estonian Academy of Sciences, proposed in the spring of 1990 that

priority be given to drafting and adopting . . . a treaty on the creation of a Union common market and the mechanism of its functioning. Its gist would be the formation of common market space, in which all republics signing the treaty and their economic entities could operate freely and, on equal terms, reach agreement on most-favored conditions and protection (prices, fees, payments, benefits and subsidies).

See *A 'Common Market' for Soviet Republics?*, *supra* note 332, at 9-10; see also Fedor Burlat-sky, *The Turning Point: Deputy's Notes*, 47 LITERATURNAYA GAZETA 1-2, translated in FBIS-SOV-90-231, Nov. 30, 1990, at 38-41 (suggesting the creation of an economic alliance and a Political Union of Sovereign Republics and Territories).

powers were limited to basic principles and programs.⁴⁸² The republics exercised full ownership of land, natural resources, and state property, and were entitled to a share of the union's gold and currency reserves.⁴⁸³ Additionally, the union had to respect republic ownership when exercising its powers.⁴⁸⁴ The Revised 1991 Draft Treaty was quite similar in this respect because it recognized the republics' rights over their land, resources, waters, and property, with the exception of major union installations.⁴⁸⁵ Thus, the format of the draft treaties reflected the Soviet republics' economic sovereignty.

In order to prevent economic balkanization and to create a unionwide market, the union treaty should have included a provision similar to the United States Constitution's Commerce Clause.⁴⁸⁶ However, the draft treaties neither included a commerce clause nor proposed a design for the future economic system.⁴⁸⁷ Moreover, the draft treaties failed to set forth a clear separation of state and private economic powers,⁴⁸⁸ or a clear vertical allocation of powers between the union and the Soviet republics.

G. *Confederative Features Prevailed in the Pre-Coup Projects for a New Union*

The attempts to create a new union treaty prior to the failed coup exemplified the concessions that the old center made to the Soviet republics. The search for a new union equilibrium departed drastically from the socialist federation created by the 1922 Union Treaty. Republic sovereignty was intended to be the pillar of a future union,

482. See, e.g., 1991 Draft Treaty, *supra* note 380, art. 5, § 2.

483. *Id.* art. 7.

484. *Id.* art. 7, §§ 2-3, 5 (stating that any transfer of ownership from a republic to the union had to be based on an agreement). Further, any implementation of union power had to respect the "framework of the law of the republics which creates the necessary conditions for the activity of the USSR." *Id.* art. 5, translated in FBIS-SOV-91-047, *supra* note 380, at 30-31.

485. See Revised 1991 Draft Treaty, *supra* note 9, art. 8; Lloyd & Freeland, *supra* note 9, at 1.

486. See U.S. CONST. art. 1, § 8, cl. 3.

487. A market economy was not among the seven basic principles mentioned in the 1990 Draft Treaty. According to the 1991 Draft Treaty, the union and the republics would "promote the functioning of a single unionwide market." 1991 Draft Treaty, *supra* note 380, art. 7, § 1, translated in FBIS-SOV-91-047, *supra* note 380, at 31. However, promoting a market does not necessarily result in deregulation or a private market.

488. The draft treaties did not grant freedom of private economic activity. The fourth basic principle of the 1991 Draft Treaty merely stated that the republics would "seek the satisfaction of people's needs on the basis of a free choice of forms of ownership and methods of economic activity." *Id.* fourth basic princ., translated in FBIS-SOV-91-047, *supra* note 380, at 29.

as opposed to a strong, centralized state. The draft treaties expressed more regard for the republics' sovereignty than a desire to create a self-sustaining center.⁴⁸⁹ This shift of power from the union to the Soviet republics had several effects. First, most of the important areas of government power, such as the economy and social welfare, were either controlled by the republics alone or by the republics and the union together. The union had few exclusive powers. Second, the union's authority was confined to setting general policies and promulgating basic rules. Implementation of these policies and rules required coordination between the union and the Soviet republics. Third, the effectiveness of the union's laws depended on the goodwill of the republics, which played a prominent role in implementing and enforcing the laws. Supremacy of the union's laws was limited to aspects of the union's legal order, the union treaty, and the constitution. Fourth, the union's system of government depended upon the republics to a considerable extent. Only the president, as the head of state, had independent power. Fifth, in foreign affairs, the draft treaties abolished the union's monopoly over the Soviet Union's international representation, thus enabling the Soviet republics to participate in the international community. Sixth, international law played an important role within the union as the relevant legal order in interrepublic relations. Finally, the legal order of the union itself was based upon an international treaty, which governed relations between sovereign states and the union.

This leads to the issue of whether the draft treaties would have created a confederation or a federation. The draft treaties would have made the center dependent on the continuing political support of the republics.⁴⁹⁰ With a limited power base,⁴⁹¹ the union would have lacked the authority to create rules of law within its own sphere of competence independent of the Soviet republics.⁴⁹² Most of the union's laws were designed to bind the republics, but not the natural and legal persons within the republics.⁴⁹³ The union's laws would have lacked supremacy over inconsistent laws passed by the republics.⁴⁹⁴ Further, the union's treaty-based character would have given

489. See generally Lane, *supra* note 33, at 179-80.

490. *Id.* (stating that a self-sustaining center is one of the criteria distinguishing federations from confederations).

491. See *id.* at 179 (noting that the transfer of power to the center must be irreversible).

492. See *id.* (stating that the center must be vested with the *Kompetenzkompetenz*).

493. See *id.*

494. See *id.*

each of the republics broad veto powers. All of these factors, taken together, reflect a confederation more than a federation.⁴⁹⁵ They would have created a highly vulnerable and delicate equilibrium that was reliant on coordinate structures. Major controversies would have ended in a stalemate, mainly because the pre-coup draft treaties did not give the *Kompetenzkompetenz* any authority. The power shift from the union to its component members did not go so far as to establish the Soviet republics as the supreme power within the union. However, the republics' declarations of sovereignty had an enormous impact on transforming the political and economic conditions in the Soviet Union, and on destroying the underpinnings of its centralized system of government.

Although the Soviet republics lacked exclusive control, authority clearly shifted away from the center. While both the republics and the union were sovereign, each depended on the other to solve the comprehensive economic, political, and societal crises facing the entire empire. This concept of power-sharing was reflected in the draft treaties. In such a dual sovereignty system, cooperation would have been necessary to uphold the union, because a confrontation between the center and the periphery could have led to its collapse. As such a union would have lacked a stable equilibrium, it is more than doubtful that it would have been viable.

VII. THE FAILED AUGUST 1991 COUP AND ITS IMPACT ON THE SEARCH FOR A NEW UNION STRUCTURE

A. *The Failure of the Conservative Coup*

1. A Compromise Nearly Reached for a New Union Treaty

Negotiations for a new union treaty proceeded successfully in July and the first half of August 1991. On July 12, 1991, the Supreme Soviet endorsed the Revised 1991 Draft Treaty.⁴⁹⁶ On July 24, 1991, the revision process was almost completed, and President Gorbachev and the leaders of the republics were willing to join a new union.⁴⁹⁷ A subsequent compromise between President Gorbachev and the Russian and Ukrainian republics on the issue of whether the future union

495. See *id.*

496. See *Auftrieb für Präsident Gorbatschow [Impetus for President Gorbachev]*, NEUE ZÜRCHER ZEITUNG [NZZ], July 13-14, 1991, at 4.

497. See *Gorbatschow gibt die Einigung auf einen Unionsvertrag bekannt [Gorbachev Announces Agreement on a Union Treaty]*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ], July 25, 1991, at 1.

would be allowed to levy taxes completed the negotiations.⁴⁹⁸ On August 20, 1991, a meeting was scheduled in Moscow to begin the signing ceremony for the new union treaty.⁴⁹⁹ The challenges to the union institutions and the Communist party, however, did not cease. Russian President Boris Yeltsin decreed a ban on all party activity in public administrations and enterprises in the Russian Federation's territory.⁵⁰⁰ The Communist party was the primary target of this measure, which aimed to radically cut back the party's traditional influence.⁵⁰¹

2. The August 1991 Coup: Starting Points and Goals

Against the background of a fragile compromise between the Communist center and the republics, and the continued dismantling of the power base of the Communist state, what many observers inside and outside the Soviet Union had feared and predicted finally occurred. On August 19, 1991, a self-appointed State Committee for the State of Emergency in the USSR ("Emergency Committee"), headed by Vice President Gennady Yanayev, and supported by some conservative forces in the Communist party, the Red Army, and the KGB, attempted to seize power in the crumbling Soviet Empire.⁵⁰² The coup leaders ordered the arrest of President Gorbachev, imposed strict censorship, declared a state of emergency, and ordered the Red Army to occupy all strategic points, including mass media enterprises

498. See *Jelzin und die neuen Realitäten in der Sowjetunion* [Yeltsin and the New Realities in the Soviet Union], FAZ, Aug. 1, 1991, at 3. The main controversy was whether the republics would have the exclusive right to levy taxes. Ultimately, the republics prevailed. Therefore, the union would have depended completely on the republics' financial contributions.

499. However, there were still some controversies regarding the shape of the future union. Apparently, some of the inadequacies of the former drafts were still present in the final version of the Revised 1991 Draft Treaty, which was published in several Soviet newspapers on August 15, 1991. See *Retuschen am Sowjetischen Unionsvertrag* [Revision of the Soviet Union Treaty], NZZ, Aug. 16, 1991, at 1. Criticism was particularly strong in the Ukrainian republic. See *Streit um den sowjetischen Unionsvertrag* [Conflict Over the Soviet Union Treaty], NZZ, Aug. 12, 1991, at 1.

500. See *Weiterer Schlag Jelzins gegen die KPdSU, Verbot der Parteiarbeit in Betrieben und Behörden* [Another Blow to the Soviet Communist Party by Yeltsin, Prohibition of Party Work in Workplaces and Government Offices], NZZ, July 23, 1991, at 1.

501. *Jelzin bestimmt die sowjetische Zukunft, ein Schlag gegen die russische Kommunisten* [Yeltsin Decides the Soviet Future, a Blow to the Russian Communists], NZZ, July 25, 1991, at 1.

502. In addition to Vice President Yanayev, the Emergency Committee included seven other members, among them the chairman of the KGB and the Soviet defense minister, interior minister, and prime minister. See Rachel Johnson et al., *The Coup Collapses; Three Days That Shook the World*, FIN. TIMES, Aug. 22, 1991, at 2.

and important public buildings.⁵⁰³

Many factors led to this coup. First, the basic integrative forces of socialist federalism, particularly the Communist party and the Red Army, were in steady decline.⁵⁰⁴ The central government's authority was challenged daily in the course of a permanent power struggle, and the union's economic situation was out of control. Another factor was that the republics claimed political and economic sovereignty, as well as legal supremacy, over the union's laws.⁵⁰⁵ Treaty-based inter-republic cooperation also circumvented the central administration.⁵⁰⁶ The persistent movement of some republics toward independence was another factor, as was the fact that the negotiations for a new union treaty gave the republics and the center equal power in a prospective union.

Thus, it was no coincidence that the coup took place on the eve of the signing of the new union treaty.⁵⁰⁷ This theory is supported by the Emergency Declaration that the coup leaders published at the beginning of the coup.⁵⁰⁸ This document, serving as justification for the coup, revealed the coup leaders' goals, which included (1) restoring the union's authority and power; (2) restoring law and order; (3) restoring the economy; (4) ending the internal power struggle; (5) halting the disintegration of the union; (6) stopping so-called excesses in the use of newly gained freedoms and liberties; and (7) preserving the sovereignty, territorial integrity, and independence of the Soviet Union.⁵⁰⁹ These goals were directed primarily against the republics, their declarations of political and economic sovereignty, their moves toward independence, the supremacy of their laws, the democratization of political life, and republic freedom and autonomy.

503. See *Moscow Clashes Leave 3 Dead; Confusion over Fate of Anti-Gorbachev Coup as Leading Republics Snub Hard-Line Rule*, FIN. TIMES, Aug. 21, 1991, at 1 [hereinafter *Moscow Clashes Leave 3 Dead*]; *Putsch der Konservativen in der Sowjetunion* [Coup of the Conservatives in the Soviet Union], NZZ, Aug. 20, 1991, at 1.

504. See *supra* notes 217-38 and accompanying text.

505. See *supra* notes 239-74 and accompanying text.

506. See *supra* notes 329-39 and accompanying text.

507. See *supra* notes 499-502 and accompanying text.

508. See *Die Moskauer "Notstandserklärung" im Wortlaut* [The Moscow Emergency Declaration Printed in Full], NZZ, Aug. 20, 1991, at 5.

509. See *id.*; see also John Lloyd, *Coup Against Gorbachev; Triple Panic That Sparked Kremlin Putsch; An Ailing Economy, Breakup of the Union and a Personal Loss of Power Prompted the Grey Men to Act*, FIN. TIMES, Aug. 21, 1991, at 2.

3. The Failure of the Coup

The coup leaders' visions and perceptions neither corresponded with the political reality, nor were they shared by the majority of the Soviet people. From the coup's beginning, the RSFSR and Ukraine, the two largest republics, as well as the Baltic republics and Kazakhstan, took a firm stand against the coup and condemned it as unconstitutional.⁵¹⁰ The popularly-elected Russian President Yeltsin headed the resistance movement, and was supported by hundreds of thousands of people.⁵¹¹ Further, most republics ignored the orders of the Emergency Committee.⁵¹² As it became apparent that only military force could make the coup successful, the role of the Red Army became crucial.⁵¹³ Generally, the soldiers and officers refused to follow the Emergency Committee's directives; they preferred to fraternize with the people, rather than open fire on their compatriots.⁵¹⁴ Within three days, the coup failed.⁵¹⁵ One of its leaders committed suicide.⁵¹⁶ Others tried to escape, but were eventually arrested.⁵¹⁷ On August 21, 1991, President Gorbachev was formally reinstated as the Soviet Union's head of state.⁵¹⁸

B. *The End of the Socialist Soviet Union*

1. The Definite End of the Socialist System of Government

Although the coup leaders had set out to preserve the union, the coup's failure ironically had the opposite effect. Instead of creating a conservative restoration, the coup began a revolution to eradicate the old political structures.

After the coup, people all over the Soviet Union began to remove or destroy the emblems, icons, and monuments of Communist rule.⁵¹⁹

510. See Gillian Tett, *Coup Against Gorbachev: Republics May Hold Key to New Rulers' Success*, FIN. TIMES, Aug. 21, 1991, at 3.

511. See *Moscow Clashes Leave 3 Dead*, *supra* note 503, at 1.

512. *Id.*

513. See Quentin Peel & Carey Schofield, *The Reluctant Pillar of Power*, FIN. TIMES, Aug. 21, 1991, at 11.

514. *Moscow Clashes Leave 3 Dead*, *supra* note 503, at 1.

515. Anthony Robinson & John Lloyd, *After the Coup: Heroes, Villians and Fence-Sitters*, FIN. TIMES, Aug. 23, 1991, at 2.

516. *Id.* (referring to the suicide of Interior Minister Boris Pugo).

517. *Id.*

518. *Gorbachev Hurries Back as Coup Attempt Collapses*, FIN. TIMES, Aug. 22, 1991, at 1.

519. See Anthony Robinson, *After the Party a King-Sized Headache; The Communist Collapse Leaves a Giant Hole at the Heart of Politics in the Soviet Union*, FIN. TIMES, Aug. 27, 1991, at 2.

Under the resolute leadership of Russian President Yeltsin, the apparent hero of the resistance against the coup, conservative apparatchiks were removed from their administrative offices.⁵²⁰ The Russian republic also blocked the Communist party from conducting any party activity.⁵²¹ The subsequent seizure of the Communist party's assets resulted in its breakdown.⁵²² Additionally, President Yeltsin urged President Gorbachev to resign as the Communist party's general secretary and to dismiss the members of the union's Cabinet of Ministers.⁵²³

The Russian republic assumed command of the remnants of the union government.⁵²⁴ A coordination committee headed by Russian Prime Minister Ivan Silayev took temporary control of the administration of the economy with President Gorbachev's reluctant approval.⁵²⁵ The vacant Cabinet of Ministers positions were temporarily filled with representatives of the Russian republic, with Russian Prime Minister Silayev also acting as the union's prime minister.⁵²⁶ Having no other choice, the Supreme Soviet agreed to this arrangement.⁵²⁷ To calm fears of possible Russian hegemony, a political accommodation among the republics' leaders led to the election of representatives from most of the republics to union government positions.⁵²⁸ On August 29, 1991, the Supreme Soviet suspended all activities of the Communist party throughout the Soviet Union.⁵²⁹

This political transition utilized the traditional institutional framework in an orderly manner. The Supreme Soviet, still dominated by conservative forces,⁵³⁰ was summoned to give its consent to the changes proposed by the republics. President Gorbachev contin-

520. *Id.*

521. *Wieviel Macht bleibt Gorbatschew* [*How Much Power Remains with Gorbachev*], NZZ, Aug. 26, 1991, at 1.

522. See Robinson, *supra* note 519.

523. *How Much Power Remains with Gorbachev*, *supra* note 521, at 1.

524. John Lloyd, *Gorbachev Fights to Hold Back Union Breakup*, FIN. TIMES, Aug. 28, 1991, at 1 (reporting on complaints of Kazakhstan's president over "Russification" of all union industries and institutions).

525. *How Much Power Remains with Gorbachev*, *supra* note 521, at 1.

526. *Id.*

527. *Provisorische Regierung in der UdSSR eingesetzt* [*Provisional Regime Started in the USSR*], NZZ, Aug. 29, 1991, at 1.

528. See Leyla Boulton, *Moscow Appoints Radical Team for Economic Rescue; Gorbachev Dismisses KGB Leadership; New Soviet Foreign Minister Named*, FIN. TIMES, Aug. 29, 1991, at 1.

529. *Tätigkeit der KPdSU suspendiert* [*Activities of the Soviet Communist Party Suspended*], NZZ, Aug. 30, 1991, at 1.

530. See *supra* notes 220-22 and accompanying text.

ued acting as the union's head of state, although the republics' leaders considered him conservative. Additionally, the Congress of People's Deputies convened to consider the intended changes that would affect that body.⁵³¹ The republics' leaders thus tried to avoid the impression that they were completely breaking with the past or violating the constitution, even though they had seized the political power of the union.

2. The Resolution of the Power Struggle: The Republics as Victors, the Union as Victim

The failure of the coup and the revolutionary events occurring in its aftermath allowed for resolution of the power struggle that plagued the union. The ambiguities in the pre-coup draft treaties concerning dual sovereignty⁵³² and the *Kompetenzkompetenz* problem⁵³³ evidenced the uncertain balance of power. As a consequence, the draft treaties were more a compromise between the union and the republics than a compact establishing a new union. As such, they reflected a union interspersed with important confederative elements, but stopped short of forming an explicit confederation, which centralist conservative forces would not have tolerated.⁵³⁴

The failure of the coup resolved many of these issues. It confirmed the pre-coup political trends, and created a new legal relationship among the republics based on both international law and the framework of a confederation. The failed coup demonstrated that the underpinnings of the old socialist system, particularly the Communist party and the Red Army, were undermined and that communism was dead. The old socialist federation ceased to exist, as all of the former integrative forces vanished and there was no longer a self-sustaining center.

The unsuccessful coup also confirmed a crucial and irreversible shift of political power toward republic supremacy and sovereignty. The republics gained possession of the plentitude of power, thus filling the power vacuum left by the old center. At the same time, the behavior of the leaders and populations of the republics made it clear that the republics would be reluctant to refrain from exercising their

531. See *infra* notes 567-73 and accompanying text.

532. See *supra* notes 454-59 and accompanying text.

533. See *supra* notes 441-53 and accompanying text.

534. This was particularly true in light of the rumors of a military coup. See *supra* notes 232-36 and accompanying text.

power and sovereignty in the framework of a new union. The republics would initiate negotiations for a new union treaty based on their political and economic sovereignty. Renegotiation of a union treaty was necessary because the 1991 Draft Treaty did not adequately reflect the new balance of power.⁵³⁵

Finally, in the aftermath of the failed coup, the old antagonism between the center and the periphery ceased to exist. That friction was partially replaced by emerging tensions among the republics, particularly between the RSFSR and the other republics. Russian President Yeltsin's press secretary increased tensions when he remarked that all borders between Russia and those republics not willing to sign a new union treaty would be open to question.⁵³⁶ This statement enraged the Ukrainian and the Kazakhstani republics.⁵³⁷ Fears of the emerging political power and weight of the RSFSR, which assumed the leadership of the Soviet Union, increased concerns over Russian imperialism and domination in the other republics.⁵³⁸

Under the decaying rule of the Communists, the power struggle took place primarily on the vertical level, with the republics showing a high degree of unity concerning the policies to be followed against the center. Once this center disappeared, the line of conflict shifted toward the horizontal level, with all of the republics serving their own unilateral interests at the expense of the other republics and the prospective union.

3. The Territorial Disruption of the Soviet Empire

This unilateralism exemplified a general move toward independence. During and after the coup, several republics declared their independence. By August 27, 1991, just eight days after the coup, seven of the fifteen republics had taken or were about to take this step.⁵³⁹ A few days later, Azerbaijan's parliament declared the resto-

535. This draft treaty left the supremacy issue undecided. See *supra* notes 441-53 and accompanying text.

536. John Lloyd & Ariane Genillard, *The Soviet Union: Republican Heavyweights Square Off; Territory Dispute Prompts Dispatch of Russian and Soviet Delegations to Ukraine*, FIN. TIMES, Aug. 29, 1991, at 3. The emerging nationalism in many republics caused further inter-republic border tensions.

537. See *id.*; see also Lloyd, *supra* note 524, at 1 (noting the president of Kazakhstan's statement that wars could flare between the republics if Russia were to raise the question of revising the borders).

538. See Leyla Boulton & Peter Marsh, *The Soviet Union: Republics Tackle Economic Chaos*, FIN. TIMES, Aug. 29, 1991, at 2.

539. Ukraine, Byelorussia, Lithuania, Latvia, Estonia, Moldova, and Georgia had de-

ration of the freedom it held from 1918 to 1920.⁵⁴⁰ As of early September 1991, all of the republics, with the notable exception of the RSFSR, had declared their independence.⁵⁴¹

Not all of these acts were aimed at gaining international recognition for the republics as independent states. Most of the republics declared independence after preliminary talks on a new union structure had begun again.⁵⁴² The declarations were often more a symbolic expression of a complete break with the old system of government than declarations of outright secession.⁵⁴³ Nevertheless, they made secession possible, and ensured a better bargaining position in the negotiations for the new union treaty.

For some of the republics, however, independence put an end to an involuntary affiliation with the Soviet Empire. Thus, the possibility of a partial territorial disruption of the Soviet Union, already foreseeable before the coup,⁵⁴⁴ became a reality. The Baltic republics were the first to reach their goal. When the world community recognized that the other Soviet republics would not object to the Baltic republics' independence,⁵⁴⁵ the EC orchestrated a wave of international recognition of the Baltic states,⁵⁴⁶ even though the union government had not yet released them officially. Less than two weeks after the coup, these republics gained formal independence from the Soviet Union,⁵⁴⁷ and eventually were admitted to membership in the

clared their independence by that time. See Leyla Boulton, *The Soviet Union: Republics Ponder the Shape of Things to Come*, FIN. TIMES, Aug. 27, 1991, at 3.

540. See *Russia Signs a Pact with Kazakhstan as Azerbaijan Secedes*, INT'L HERALD TRIB., Aug. 31-Sept. 1, 1991, at 1 (Zurich, Switz. ed.).

541. See John Lloyd, *Russia Binds Reform to New Aid from West*, FIN. TIMES, Sept. 10, 1991, at 3.

542. See *infra* notes 561-80 and accompanying text.

543. The declarations of independence were made during and in the aftermath of the coup. Thus, they were directed foremost against the old system. At the same time, the republics began talks regarding a new union. See, e.g., Peter G. Gosselin, *Cutting the Soviet Knot: For Republics, Going It Alone Won't Be Easy*, BOSTON GLOBE, Sept. 29, 1991, at 33.

544. For a discussion of the referenda on independence held in the Baltic republics before the coup, see *supra* notes 5, 275-78 and accompanying text.

545. See Anthony Robinson, *Gorbachev Clears Way for Baltic Independence; Soviet President Bows to Pressure for Swift Implementation of Market-Oriented Reforms*, FIN. TIMES, Aug. 27, 1991, at 1.

546. The EC formally recognized the independence of the Baltic republics on August 27, 1991. See David Gardner & Andrew Hill, *EC Recognizes Independence of Baltic States*, FIN. TIMES, Aug. 28, 1991, at 1. The United States formally recognized their independence on September 2, 1991. See Gillian Tett, *The Soviet Union: Quiet Welcome from U.S. Recognition of Baltics*, FIN. TIMES, Sept. 3, 1991, at 3, 18.

547. The Soviet foreign minister recognized the Baltic states' independence on September

United Nations.⁵⁴⁸

Georgia, Armenia, and Moldova⁵⁴⁹ were unwilling to join a new union under any circumstances. Ukraine's political leadership was ambivalent, because it had to await the outcome of a referendum on independence held on December 1, 1991.⁵⁵⁰ By the end of 1991, the world community had not yet responded to the independence claims of these republics.⁵⁵¹

C. Attempts to Find a New Union Equilibrium

1. Continuation of Interrepublic Cooperation

The complicated ties and interdependencies created by more than seventy years of centralized Communist rule made independence a relative term. The high degree of economic integration and labor-sharing in the Soviet economy limited the scope of the republics' actions. It would have been ruinous for the republics to go their own ways.⁵⁵² Thus, even those republics intending to secede cooperated in solving their most urgent common problems.⁵⁵³ Such cooperation reflected the republics' new responsibilities in filling the power vacuum left by the center and establishing foundations for a more stable inter-republic structure.⁵⁵⁴ Accordingly, a confederative structure based on interrepublic agreements replaced the federal union structure.⁵⁵⁵

This confederative structure was reminiscent of the period of 1918 to 1922 when a Moscow-centered network of treaties devised a

6, 1991. See John Lloyd & Mark Nicholson, *Soviet Union Recognizes Baltic States; Negotiations to Begin on Citizenship, Legal Rights and Trade Links*, FIN. TIMES, Sept. 7, 1991, at 22.

548. See *Die baltischen Staaten in der UNO willkommen* [The Baltic States Are Welcome in the U.N.], NZZ, Sept. 13, 1991, at 1.

549. Moldova intended to merge with Romania, which ruled Moldavia's territory from 1918 to 1940. See Brenda Fowler, *Vexed, Moldavia Awaits Some Nods of Recognition*, INT'L HERALD TRIB., Sept. 2, 1991, at 2.

550. On December 1, 1991, a large majority of the people in Ukraine voted in favor of independence. See *infra* notes 723-24 and accompanying text.

551. See *infra* notes 634-46 and accompanying text.

552. See Martin Wolf, *Breaking Up Is Hard to Do*, FIN. TIMES, Aug. 29, 1991, at 14 (arguing that complete political autonomy for the republics would lead to the disintegration of the Soviet economy and would inflict something close to economic death). Some experts did not share this opinion. See *infra* note 588.

553. See *Independent, But Together*, FIN. TIMES, Sept. 6, 1991, at 14.

554. In the pre-coup period, this cooperation aimed to circumvent a powerful central government. See *supra* notes 329-39 and accompanying text.

555. See John Lloyd & Ariane Genillard, *Pact Between the Ukraine and Russia 'Marks End of Old Union'*, FIN. TIMES, Aug. 30, 1991, at 2 (quoting the Ukrainian environment minister's statement that the Russia-Ukraine pact was "the acknowledgment of the disintegration of the Soviet system in its old form").

structure leading to the 1922 Union Treaty.⁵⁵⁶ The RSFSR again played a key role, due to its large population, political power, and economic potential.⁵⁵⁷ However, differences existed. In the new confederative structure, cooperation was dictated mainly by the need to overcome the economic strife caused by the socialist system of government.⁵⁵⁸ Two significant conditions that made the reunification of the former Tsarist Empire possible did not exist in the post-coup period: (1) foreign intervention associated with the civil war period; and (2) the unifying influence of a well-organized political force.⁵⁵⁹ The unifying influences were predominantly economic in nature.⁵⁶⁰ Thus, the necessary political framework could be looser than that of a federation.

2. The RSFSR-Ukraine and RSFSR-Kazakhstan Treaties as Nuclei of a New Confederation

President Gorbachev proposed a seven-point program shortly after the failure of the coup, stressing that the signing of the union treaty and economic reform were of central importance.⁵⁶¹ However, although the republics wanted to prevent the complete break-up of the Soviet Union, they wanted the surviving central institutions to have only a minor role in the process of building a new union. First, the RSFSR and Ukraine concluded a pact designed to continue economic and military cooperation, and to stop the process of disintegration.⁵⁶² The leaders of these two republics, when referring to the "former Soviet Union," pronounced that a future federal government

556. See *supra* notes 131-37 and accompanying text.

557. See John Lloyd, *After a Long Sleep, Russia Awakens*, FIN. TIMES, Aug. 31, 1991, at 6 (describing how the RSFSR seized the chance to extend its power and influence over its neighbors).

558. See John Lloyd, *Power Shift Precludes Extensive Economic Reform*, FIN. TIMES, Sept. 5, 1991, at 2.

559. See *supra* notes 131-37 and accompanying text.

560. Economic constraints impacted the building of the socialist federation as well. See *supra* notes 149-50 and accompanying text.

561. This seven-point program included (1) conclusion of the union treaty; (2) negotiations with the republics willing to leave the union and negotiations for an economic agreement among all of the republics; (3) establishment of a transitional government; (4) convention of an extraordinary Congress of People's Deputies of the USSR; (5) establishment of effective control over the army, the law enforcement agencies, and the KGB; (6) economic reform; and (7) an election campaign to elect all union officials, including the president. See *The Soviet Union; Gorbachev's Seven Point Programme*, FIN. TIMES, Aug. 27, 1991, at 2.

562. See John Lloyd & Ariane Genillard, *Russia and Ukraine in Pact to Stop Break-up*, FIN. TIMES, Aug. 30, 1991, at 1.

should not play a role in interrepublic relations.⁵⁶³ The president of Ukraine also suggested that President Gorbachev should be excluded from the negotiations for a new union treaty, in order to prevent "any centrist domination."⁵⁶⁴ Shortly thereafter, the RSFSR and Kazakhstan concluded a similar agreement, which also settled border disputes between them.⁵⁶⁵ Hence, the three most economically powerful republics joined under the leadership of the RSFSR to prevent the complete disintegration of the union and to foster interrepublic cooperation aimed at a new confederative structure.⁵⁶⁶

3. Confederative Features of the Arrangement for an Interim System of Government

At an extraordinary session of the Congress of People's Deputies,⁵⁶⁷ convened to legitimize the changes championed by President Gorbachev and the republic leaders, such a confederative structure was proposed.⁵⁶⁸ The proposal was directed at securing union structures for an interim period, and was based on an agreement among ten republics and President Gorbachev.⁵⁶⁹

The arrangement provided for three bodies to run the remnants of the centralized union structure: (1) a State Council, composed of the union president and the leaders of the republics, to coordinate foreign and domestic issues; (2) a Council of Representatives of Peoples' Deputies, comprised of twenty deputies from each republic; and (3) an interim Interrepublic Committee to coordinate economic reform and transition to a market economy.⁵⁷⁰ It further proposed an economic agreement among all the republics, including those not willing to join a new union, and the start of talks on a new union treaty.⁵⁷¹

This arrangement abolished an autonomous, self-sustaining

563. *Id.*

564. *Id.*

565. *Russia Signs a Pact with Kazakhstan as Azerbaijan Secedes*, *supra* note 540, at 1.

566. *Id.*

567. The Congress of People's Deputies was formally the supreme lawmaking body of the union. *See supra* notes 218-20 and accompanying text; *see also* Ludwikowski, *supra* note 3, at 145-46.

568. *See* Leyla Boulton & John Lloyd, *Soviet Formula to Rescue Union*, *FIN. TIMES*, Sept. 3, 1991, at 1.

569. *Id.*

570. *Id.*

571. *Id.*

center, and vested the republics with the *Kompetenzkompetenz*⁵⁷² within the union. It strictly endorsed the principles of the republics' equality and sovereignty by giving the republics an equal weight in the union institutions and relying on intergovernmental coordinative structures and decision making procedures. Although the arrangement implicitly abolished the Congress of People's Deputies, that body approved it in response to political pressure by President Gorbachev and the republics' leaders.⁵⁷³ The committees of the Congress of People's Deputies did not discuss the proposal, which was the usual procedure; instead, the proposal was discussed among the deputies of each republic.⁵⁷⁴ This approach reflected the emergence of a confederative structure even in the decision making process of old union institutions.

The shape of the transitional bodies of the union government mirrored the political power of the republics. The State Council, composed of the republics' leaders and the union president, made day-to-day decisions. The Council of Republics, the upper chamber of the Supreme Soviet, consisted of twenty representatives of each republic, fifty-two representatives of the RSFSR, and one representative of each autonomous area.⁵⁷⁵ The Council of the Union was composed of representatives of equally populated districts throughout the Soviet Union.⁵⁷⁶ The interrepublic Economic Committee, as "super-ministry," replaced the former union ministries and coordinated economic management of the republics participating in the economic community.⁵⁷⁷ This scheme confirmed the union government's demise and affirmed the republics' ability to direct union affairs without interference from an independent center. Only the union president continued to wield any power, and even this power was minimal, given that the State Council made all of the meaningful decisions.

The structure approved by the Congress of People's Deputies endorsed these concepts, but followed the pre-coup bicameral model of

572. See *supra* text accompanying note 65.

573. See *Text of Resolution on Soviet Changes*, INT'L HERALD TRIB., Sept. 6, 1991, at 5.

574. See John Lloyd & Lionel Barber, *Gorbachev Rethinks Union; Soviet Leader Replaces Plan to Grant Republics Political Supremacy*, FIN. TIMES, Sept. 4, 1991, at 1.

575. John Lloyd & Anthony Robinson, *Gorbachev Wins Backing for Soviet Reform Plan*, FIN. TIMES, Sept. 6, 1991, at 1.

576. *Id.*

577. See *Soviet Government to be Slashed; Fifty-Thousand Jobs Could Go as Central Bureaucracies are Abolished*, FIN. TIMES, Nov. 6, 1991, at 3.

the Supreme Soviet.⁵⁷⁸ Further, it made the RSFSR's representation in the Council of Republics more commensurate with its size and population.⁵⁷⁹ Given that more than half of the Soviet population lived in the RSFSR, this republic obtained a majority in the Council of the Union.⁵⁸⁰

4. The Project of an Economic Community

The plan and structure approved by the Congress endorsed a dual approach to a prospective union consisting of a common market and supplemental political structures. At an interrepublic meeting in Alma Ata in October 1991, twelve republics agreed to a plan for creating an economic community for an initial period of three years.⁵⁸¹ According to this plan, the main pillars of the economic community were (1) free movement of goods, services, and labor; (2) a common monetary and central banking system; (3) a unified tax system; (4) a community budget; and (5) a common price policy.⁵⁸² Supplementary agreements among the republics on issues ranging from taxation to labor policy would have been necessary for its implementation.⁵⁸³ In addition, the republics would have had to agree to common structures in security and defense matters, particularly those regarding the Red Army and the nuclear arsenal.⁵⁸⁴

Implementation of the 500-day transition plan of the Shatalin working group⁵⁸⁵ would have moved the Soviet Union toward the model of the EC.⁵⁸⁶ However, unlike the EC, the goal of the Soviet common market was less the integration of several economies than the orderly decentralization of the highly integrated Soviet economy. With sovereignty of the republics as the basic principle, the union

578. See John Lloyd, *Swift Reversal Saves the Union from Oblivion*, FIN. TIMES, Sept. 4, 1991, at 2.

579. *Id.*

580. *Id.*

581. See Leyla Boulton, *Soviet Republics Move Towards a Common Market*, FIN. TIMES, Oct. 2, 1991, at 22.

582. *Id.*

583. *Id.*

584. John Lloyd & Gillian Tett, *Tentative Start to a Hazardous Journey*, FIN. TIMES, Dec. 23, 1991, at 2.

585. See *supra* note 480. The chief architect of the economic community project, Gregory Yavlinsky, was a member of the Shatalin working group. See John Lloyd, *Economic Reform Plans Jostle for Approval*, FIN. TIMES, Sept. 10, 1991, at 2; see also Robinson, *supra* note 519, at 1.

586. The Shatalin Plan was inspired by the model of the EC. See Hewett, *supra* note 480, at 152.

would have held powers delegated by the republics. This delegation would have been revocable in order to secure republic autonomy.⁵⁸⁷

This scheme reflected the enormous impact of the republics' newly gained freedoms and the dilemma that many republic leaders faced regarding their republics' future affiliation with the union. Although rebuilding a common political and economic structure was generally considered a necessity,⁵⁸⁸ the republics' leaders had to consider the independence-minded majorities in their republics. For these leaders, it was often more profitable to advocate a complete break with the union than to contribute to a new interrepublic structure.⁵⁸⁹ Moreover, emerging interrepublic and ethnic tensions caused the republics to drift further apart, making negotiations for a new union even more difficult. The March 17, 1991, referendum,⁵⁹⁰ although not legally binding, showed that a clear majority in nine republics favored preservation of the union.⁵⁹¹ Yet, the impact of the referendum on the search for a new equilibrium in the Soviet Union was negligible.

A flexible approach allowing each republic to autonomously define its place in the new union was also advocated. For instance, membership in the common market would not have required simultaneous membership in the prospective political confederation, so republics claiming political independence could still have taken part in the common market. However, negotiations among twelve republics regarding the Soviet common market revealed the enormous difficulties associated with finding a consensus on a joint economic framework.⁵⁹² Basic issues, such as a common currency,⁵⁹³ the institutions to be established, the decision making procedures, and the coordination of the economic powers of the republics with those of the com-

587. A draft constitution of the RSFSR provided for delegation of power to a future union only in specific cases, and maintained the right to withdraw such delegated powers at any time. See Leyla Boulton & John Lloyd, *The Soviet Union: Deputies Delay Vote to Salvage the Union*, FIN. TIMES, Sept. 5, 1991, at 2.

588. But see Chrystia Freeland, *Economics Plot Go-It-Alone Strategy for the Ukraine*, FIN. TIMES, Sept. 27, 1991, at 2 (discussing claims by foreign economic advisers that complete independence of the Soviet republics would make their transition to a market economy easier).

589. See, for example, the independence referendum in Ukraine. See *infra* notes 722-26 and accompanying text.

590. See *supra* notes 381-85 and accompanying text.

591. See *supra* note 385 and accompanying text.

592. See Freeland, *supra* note 588.

593. Ukraine plans to introduce a separate currency in the first quarter of 1992. See Chrystia Freeland, *Republics Shun Yavlinsky Plan; Leaders Opt for Alternative to Moscow's Version of Economic Union*, FIN. TIMES, Sept. 23, 1991, at 2.

munity, were disputed. Furthermore, mechanisms for implementing and enforcing the policies of the economic community also faced the obstacles of republic sovereignty. These obstacles were more difficult to overcome than those of the EC, where a common legal heritage and a general respect for the law are solid societal bases for ensuring compliance in a community that is supranational and legal in nature.⁵⁹⁴ These bases were absent in the Soviet Union, which lacked a tradition of the rule of law and had to overcome the barriers of republic sovereignty. The economic community's main goals of moving to a market economy and establishing legal foundations for a market economy would have required the republics to refrain from exercising their full sovereignty in economic matters. The transition to a market economy also would have produced secondary problems, such as high unemployment, and a sudden increase in the cost of rent and basic goods and services. These social problems, which became the responsibility of the republics, could have led the republics' leaders to ignore economic community policy for the sake of short-term local political gains.

5. An Emerging Confederative Political Structure

In the Soviet Union, economics and politics were the pillars of a highly centralized and tightly administered system of government.⁵⁹⁵ This interrelation continued to impact political and economic life after the failed coup. A decision such as denationalization of an economic sector is highly political in nature. Shifting to a market economy necessitates a political structure to support and supplement the goals of an economic community. Due to the legacy of the centrally planned economy, a prospective economic community in the Soviet Union would be much more intertwined with the political structure than in the western European countries. The EC member states built a common market while retaining full political sovereignty.⁵⁹⁶ Yet, more than thirty years passed before they engaged in

594. It is striking that neither the EEC Treaty nor the Euratom Treaty provides for sanctions against a member state that disobeys the judgments of the Commission of the European Communities or the European Court of Justice. See Werner F. Ebke, *Enforcement Techniques Within the European Communities: Flying Close to the Sun with Waxen Wings*, 50 J. AIR L. & COM. 685, 697 (1985). A consensus-oriented policy aimed at accommodating conflicting interests of the member states could avoid major challenges to the community's authority. *Id.* at 701-02.

595. See *supra* notes 265-69 and accompanying text.

596. This follows from the so-called sectoral approach of European integration. See Gün-

serious talks regarding further political integration.⁵⁹⁷ The starting point in the Soviet Union was different because the transition to a market economy in the Soviet Union implied many political decisions. The separation of economics and politics remained the prerequisite for a viable market economy, and thus required a continuing coordination of the republics' economic and social policies.

There were many obstacles on the way to a common political structure. Considerable disagreement persisted in the republics as to the political structure's powers and goals. Some of the republics wanted to comprehensively coordinate their foreign policies, while others only parts of it; some wanted to unify defense and security matters, while others claimed a right to have their own army; and some were preoccupied by human rights-related problems, minority protection, and democratization, while others were building an ethnically based political system with authoritarian features.⁵⁹⁸ Distrust of a new center was common in the republics. Before the establishment of the CIS, it was conceivable that, due to the republics' unwillingness to compromise, the structure of the prospective union would lack substantial unity and would leave the sovereignty of the republics virtually intact. The union would be designed to provide opportunities for intergovernmental discussion of issues of common interest, rather than to legally bind the republics to their common decisions. Its legislative, judicial, and executive powers could remain undefined. Pacts among republics willing to establish a closer relationship among themselves could stabilize and supplement such a structure.

There are historical examples of such heterogeneous unions of states. The old Swiss Confederation, for example, was a network of heterogeneous pacts between communities that established an alliance to preserve their independence and create peace and security.⁵⁹⁹ The structure of the old Swiss Confederation consisted of an assembly of delegates from each community, a rotating capital that directed common affairs when the assembly was not in session, and a federal chancellery consisting of a chancellor and a secretary of state.⁶⁰⁰ In

ther Jaenicke, *European Integration*, in 6 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, *supra* note 28, at 167, 168.

597. These efforts culminated in the Maastricht Summit attended by the leaders of the 12 EC member states. See David Buchan, *EC's Chance to Catch the Tide of History*, *FIN. TIMES*, Dec. 7, 1991, at 41.

598. See *infra* notes 603, 609-10.

599. See FORSYTH, *supra* note 81, at 18-20.

600. See *id.* at 24, 28.

addition to the old Swiss Confederation, the United Provinces of the Netherlands⁶⁰¹ and the German Bund⁶⁰² show that there can be viability despite a minimal organizational framework.

The sovereign component members of a union may define their relations with each other, as well as with the union as a whole. Both sovereignty and self-determination protected the freedom of the Soviet republics to engage in interrepublic cooperation. A new equilibrium cannot exceed a common limit set by the former Soviet republics. Basic problems in the former Soviet Union, such as national hostilities, minority problems,⁶⁰³ protection of human rights, and democratization, require solutions and mechanisms for implementing a common policy.⁶⁰⁴ Formal procedures are necessary for the enforcement and settlement of interrepublic disputes. The sudden transition to a de facto confederation after the failed August 1991 coup made resolving these problems in the framework of a new union treaty even more difficult than before.⁶⁰⁵ Prior to the coup, these issues could have been accommodated in a constitution based on the treaty. However, a dual legal framework consisting of a union treaty and a constitution did not survive the subsequent developments leading to the creation of the CIS.

The interim system of government,⁶⁰⁶ which guaranteed a minimum of continuity on the union level, allowed the republics' leaders and populations to decide their policies. Constitutional changes, understood as genuine expressions of democratic representation and sovereignty of the people,⁶⁰⁷ and the new political realities in the

601. See *id.* at 30-40.

602. See *id.* at 43-53.

603. Minority problems are volatile in all of the former Soviet republics, including the Baltic states. See *Rival Groups Rally in Deepening Crisis in Soviet Georgia*, INT'L HERALD TRIB., Sept. 17, 1991, at 2 (discussing the Polish protest against Lithuania's suspension of self-government for its Polish minority); *Next Steps in Moscow*, FIN. TIMES, Aug. 27, 1991, at 12; see also Gillian Tett, *Minorities Offer Acid Test of Lithuanian Democracy*, FIN. TIMES, Sept. 10, 1991, at 2.

604. See, however, Russian President Yeltsin's temporarily successful attempt to bring Azerbaijan and Armenia together for talks on the disputed territory of Nagorno-Karabakh. See Mark Nicholson, *Yeltsin Claims Breakthrough in Azerbaijan*, FIN. TIMES, Sept. 25, 1991, at 3.

605. The pre-coup draft treaties failed to convincingly address these problems. See *supra* notes 468-88 and accompanying text.

606. See *supra* notes 567-80 and accompanying text.

607. See, e.g., John Lloyd, *Draft Constitution Asserts Sovereign State of Russia*, FIN. TIMES, Sept. 14, 1991, at 22 (discussing a draft for a new RSFSR constitution providing for the RSFSR's own internal, foreign, and defense policies, including a strategic nuclear arsenal, a "social market" economy, and a comprehensive list of basic freedoms and liberties).

republics shaped the search for a new union. International law-based cooperation among the republics,⁶⁰⁸ and among the republics and neighboring countries, also continued.

The former Soviet Union became a laboratory where the sovereign republics carried out experiments ranging from inter-governmental cooperation, political agreements, compacts, and economic agreements, to international treaties and negotiations regarding common structures. These experiments sometimes conflicted, and their goals were often unclear. The same can be said about the political shape of the republics. Democracy and a market-type economy, as well as authoritarian nationalism⁶⁰⁹ and old-fashioned socialism,⁶¹⁰ were advocated.

Three structural levels upon which a prospective union could be based were conceivable: (1) a heterogeneous network of agreements and compacts among the republics based on international law; (2) a treaty establishing an intergovernmental economic community; and (3) a union treaty establishing confederative political structures and institutions with limited goals, especially in the areas of foreign affairs, international security and cooperation, and defense. The source of law in this framework would have been international, rather than constitutional. The areas not covered by interrepublic treaties would have been ruled by international instruments, particularly the Universal Declaration of Human Rights,⁶¹¹ the Final Act,⁶¹² the principles of the United Nations Charter,⁶¹³ and other international human rights pacts.⁶¹⁴ In addition, some rules common to the Soviet republics would have applied. The establishment of the CIS in December

608. See, e.g., Chrystia Freeland, *Republics Shun Yavlinsky Plan*, FIN. TIMES, Sept. 23, 1991, at 2 (discussing three interrepublic agreements concerning trade relations, monetary policy, communication, and transportation, designed to frustrate any attempts to establish a Moscow-based economic community).

609. See, e.g., Neil Buckley, *Georgian Leader Acts Against 'Coup'*, FIN. TIMES, Sept. 25, 1991, at 16 (discussing the president of Georgia's imposition of a state of emergency to suppress opposition against his increasingly dictatorial regime).

610. See, e.g., Mark Nicholson, *Tajiki Communists Hit Back*, FIN. TIMES, Sept. 24, 1991, at 24 (reporting that Communist forces in Tajikistan's parliament were able to oust the acting president, who wanted to ban the Communist party).

611. G.A. Res. 217A, *supra* note 42.

612. Final Act, *supra* note 304.

613. See generally U.N. CHARTER. The resolution of the Congress of the People's Deputies referred to these international instruments in sections 6 and 7. See *Text of Resolution on Soviet Changes*, *supra* note 573.

614. See, e.g., G.A. Res. 2200, *supra* note 42, at 49; G.A. Res. 2200, *supra* note 42, at 52; G.A. Res. 55, *supra* note 42.

1991 brought this process of creating a new common structure to a temporary end.⁶¹⁵

VIII. PROBLEMS OF INTERNATIONAL LAW

A. Issues

Due to the altered position of the Soviet republics, the end of the old Soviet Union, and the transition from a federation to a de facto confederation, the character of the union and the Soviet republics was uncertain. This uncertainty concerned the world community,⁶¹⁶ as it gave rise to the questions of (1) international recognition of the former Soviet republics as states; (2) state succession with regard to treaties and the public debt; and (3) international representation of the union and the republics, including their membership in international organizations. Answers to these questions depended on the shape of the internal legal system of the republics and the prospective union.⁶¹⁷ Nonetheless, internal political trends in the former Soviet Union helped to clarify some of these issues even before the creation of the CIS.

B. Problems of International Recognition of Soviet Republics as States

1. Doctrine of Recognition as Applied to Different Categories of Soviet Republics

While all of the former Soviet republics, with the notable exception of the RSFSR, declared their independence,⁶¹⁸ the international community debated whether to honor their statehood claims. International law has its own requirements for determining statehood.⁶¹⁹ The prevailing view is to treat any entity satisfying these requirements as a state.⁶²⁰ However, international recognition may be withheld if there are doubts about the entity's long-term viability.⁶²¹ Particularly in the case of secession or a country's dissolution, it may not be imme-

615. For a discussion of the creation of the CIS, see *infra* part IX.A.

616. See *supra* part IV.G.

617. See HENKIN ET AL., *supra* note 86, at 267-68.

618. See *supra* notes 539-41 and accompanying text.

619. See *supra* note 340 and accompanying text.

620. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202(1) (1987). It is well-settled in international law that statehood does not depend on formal recognition by other states. See *id.* § 202 cmt. b.

621. *Id.* § 202 reporters' note 4.

diately clear that a new state has been established.⁶²² A premature recognition made during the process of clarification would violate the "parent" state's right of protection of its territorial integrity and non-interference in its internal affairs.⁶²³

In view of the developments in the Soviet Union, it is useful to distinguish three categories of Soviet republics. As of October 1991, the Baltic republics had gained international recognition, whereas three other republics that had expressed their intention to end their affiliation with the Soviet Union were still waiting for their independence claims to be honored.⁶²⁴ All of the other republics continued to take part in the union government and were willing to establish closer relations with the other republics.

a. Category 1: The Baltic States

Many countries recognized the independence of the Baltic states even before their official release from the union.⁶²⁵ This raised the possibility of premature recognition, as well as doubts about the viability and independence of these states, in view of their continued close ties to the former Soviet Union and the Red Army's occupation of their territories.⁶²⁶ However, objections to their status as independent states were unfounded.

The world community has departed from strict adherence to the theory that recognition without the consent of the "parent" state constitutes an unlawful intervention.⁶²⁷ In the case of the Baltic states, it was politically conceivable after the failed coup that the other republics, more or less directing the union government, would not object to their independence.⁶²⁸ The world community, therefore, could reasonably expect the Red Army to be withdrawn in due course⁶²⁹ and

622. *Id.* § 202.

623. *Id.* § 202 cmt. f.

624. These republics were Georgia, Armenia, and Moldova. Moldavia intended to merge with Romania. *See supra* note 549 and accompanying text.

625. *See supra* notes 545-48 and accompanying text.

626. Apart from political reasons, this might have been the main reason why the United States was hesitant to acknowledge the independence of the Baltic states.

627. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 reporters' note 4 (1987) (referring to the cases of Algeria and Guinea Bissau).

628. *See supra* note 545.

629. The mere fact that the Red Army was still present on the Baltic states' territory was not a sufficient reason to deny these states statehood. In the process of decolonization, states in some instances have recognized a territory as a new state despite the fact that the troops of the colonial power appeared to be in firm control. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 reporters' note 4 (1987).

the remaining ties to the Soviet Union to be regulated by the interim union government. Moreover, the international law standards regarding the viability of states are low, and even small nations that are economically and politically dependent on their neighbors have been admitted to full membership in the United Nations.⁶³⁰ Thus, an application of the traditional international law criteria reveals that the Baltic states were entitled to recognition. Their existence as independent states between the two world wars,⁶³¹ and their forced incorporation into the Soviet Empire, which violated international law and their right to self-determination,⁶³² necessitated their international recognition in 1991. In fact, many countries did not officially recognize them as new states, but simply re-established diplomatic ties that existed between 1920 and 1940.⁶³³

b. Category 2: Other Republics Willing to Become New Independent States

The other republics that sought complete independence in the latter half of 1991, Georgia, Moldova, Armenia, and possibly Ukraine, presented a more complex problem. Each of these republics had its own historical background, and although each had enjoyed some sovereignty between 1918 and 1922,⁶³⁴ none ever became completely independent.⁶³⁵ On the other hand, in the pre-coup period of 1988 to 1991, these republics already had begun the process of attaining statehood.⁶³⁶ Some of them refused to take part in the drafting of a new union treaty or to participate in the March 17, 1991, referendum on the preservation of the union.⁶³⁷ Due to the power shift in the aftermath of the failed coup, these republics were further able to

630. See HENKIN ET AL., *supra* note 86, at 234.

631. See *supra* notes 279-84 and accompanying text.

632. See *supra* notes 324-28 and accompanying text.

633. See, for example, Switzerland, which re-established diplomatic ties on August 28, 1991. See *Baltische Republiken diplomatisch anerkannt* [Baltic Republics Diplomatically Recognized], NZZ, Aug. 29, 1991, at 21.

634. See *supra* parts III.B, C.

635. For example, Armenia and Georgia became members of the Transcaucasian Federation in 1920. The 1922 Union Treaty was subsequently signed by that federation and not by its component members. See *supra* notes 140, 148 and accompanying text. Moldova was first part of Tsarist Russia, then Romania, and was later incorporated into the Soviet Union in 1940 under the Molotov-Ribbentrop Pact, which made the incorporation of the Baltic republics possible.

636. See *supra* part IV.G.

637. See *supra* note 384 and accompanying text.

obtain supremacy and sovereignty.⁶³⁸ Thus, another obstacle to their independence, a center preventing them from exercising supreme authority over their territories,⁶³⁹ ceased to exist. These republics were able to invoke the right of self-determination, as well as the constitutional right to secede,⁶⁴⁰ as confirmed in the Congress of People's Deputies' September 5, 1991, resolution concerning the changes in the Soviet Union.⁶⁴¹ Further, the pre-coup draft treaties provided for full membership of the republics in the international community,⁶⁴² and the Congress of People's Deputies subsequently affirmed this principle.⁶⁴³ Given the power shift after the coup, the international community eventually had to honor the republics' desire for complete independence.⁶⁴⁴

In the second half of 1991, the relations of these republics with the Soviet Union, and the attitudes of the other republics toward their independence, were in a state of flux. The Congress of People's Deputies' September 1991 resolution stated that negotiations would be necessary to resolve all issues "relating to secession, as well as their immediate joining in the Nuclear Nonproliferation Treaty, the Final Act of the Conference on Security and Cooperation in Europe and other important international agreements, including those which guarantee the rights and freedoms of the individual."⁶⁴⁵ This proviso could have delayed international recognition of these republics. Additionally, the Soviet Union, as a permanent member of the United Nations Security Council, could have used its veto power to impose conditions on the republics' membership in the United Nations.⁶⁴⁶ However, with the formal end of the Soviet Union and the establish-

638. See *supra* part VII.B.2.

639. See *supra* notes 351-56 and accompanying text.

640. See *supra* part V.F.

641. See *Text of Resolution on Soviet Changes*, *supra* note 573.

642. See *supra* notes 460-63 and accompanying text.

643. In its resolution on the changes in the Soviet Union, the Congress of People's Deputies decided to "support the aspiration of republics for their recognition as subjects of international law and for consideration of their membership in the United Nations." See *Text of Resolution on Soviet Changes*, *supra* note 573.

644. See *supra* part VI.E.

645. *Text of Resolution on Soviet Changes*, *supra* note 573.

646. According to the United Nations Charter, the admission of a state to membership in the United Nations is effected by a decision of the General Assembly upon a recommendation of the Security Council. U.N. CHARTER art. 4, ¶ 2. Such a Security Council recommendation is a prerequisite for admission to the United Nations. See Advisory Opinion No. 9, Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 7-8 (Mar. 3).

ment of the CIS, there were no longer any obstacles to international recognition of these republics.

c. Category 3: Republics Willing to Remain in the Union

All of the projects for a new union were based on the principle that the union's component entities would be sovereign, with each republic able to define its legal and political ties to the union. Further, all of the republics would be able to seek international recognition. This proposition was reflected in the pre-coup draft treaties, which described all of the Soviet republics as full-fledged members of the international community,⁶⁴⁷ and was confirmed by the dramatic change in the internal balance of power in the latter half of 1991. As sovereign members of a prospective confederation, they were to be viewed as states under international law.⁶⁴⁸

C. Problems of State Succession

1. State Succession: Continuity and Succession of States in the Former Soviet Union

Discussions of the legal problems of state succession began with the independence of the Baltic states.⁶⁴⁹ Absent a self-sustaining union center, and given the prospect of a confederative union of sovereign states, state succession became an important issue. Questions arose as to the continuing validity of treaties concluded with the Soviet Union. If no entity were to assume the Soviet Union's position, much of what was achieved in the areas of human rights, disarmament, and international cooperation would be endangered. Thus, the changes in the Soviet Union affected international responsibility and liability for the acts of the former Soviet Union.

State succession is one of the most controversial fields in international law.⁶⁵⁰ The distinction between state continuity and state succession is fundamental.⁶⁵¹ Despite many historical examples of changes in government, territory, and population, no well-settled body of law exists for determining whether events in a country consti-

647. See *supra* note 460 and accompanying text.

648. See *supra* notes 96-98 and accompanying text.

649. See, e.g., David White, *Who Will Implement CFE Arms Treaty?*, FIN. TIMES, Sept. 25, 1991, at 3 (describing the legal problems in implementing the Conventional Forces in Europe Treaty caused by the Soviet Union's disintegration).

650. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 reporters' note 1 (1987).

651. See CRAWFORD, *supra* note 14, at 400.

tute a state succession case. The criteria applied are not always consistent, and, sometimes, both the substance of a change and the way it is carried out will play a role.⁶⁵² The case of the Soviet Union's disintegration is particularly complicated, as it involves concurrent changes in government, territory, and population. Although this Article cannot fully address this topic, one can arrive at some preliminary conclusions by considering the three categories of Soviet republics developed above.⁶⁵³

First, the Baltic states constituted a case of state succession because they were officially released from the Soviet Empire, and thus obtained full and universally recognized independence. However, given that they were occupied illegally by the Soviet Union,⁶⁵⁴ their achievement of independence in 1991 could also be regarded as an act of regaining statehood. Thus, different rules might apply. Arguing that this constitutes a case of "reversion to sovereignty"⁶⁵⁵ or "retroactive statehood"⁶⁵⁶ implies that these states started from the point where their sovereignty ceased to exist, and that they had no responsibility for the international obligations incurred by the Soviet Union.⁶⁵⁷ However, it is doubtful whether this theory has a sufficient foundation in international law to apply to the Baltic states. Arguably, more than fifty years of tight Soviet rule in the Baltic republics and the continuing close ties of the Baltic republics and the other republics interrupted continuity with the Baltic states as they existed between 1918 and 1940.⁶⁵⁸ This is particularly true in international law, where, due to a decentralized structure and a lack of international enforcement authority, the status quo often has to be recognized, even if it arose from a violation of international law.⁶⁵⁹

Second, the republics willing to become fully independent states in the latter half of 1991 also created a case of state succession. It would have been artificial to apply the theory of retroactive statehood to these republics, since their brief period of independence was based

652. *Id.*

653. *See supra* part VIII.B.1.

654. *See supra* notes 324-28 and accompanying text.

655. *See CRAWFORD, supra* note 14, at 414-16.

656. *See Western Sahara*, 1975 I.C.J. 12, 57 (Oct. 16).

657. *See CRAWFORD, supra* note 14, at 414-16.

658. *See id.* The doctrine of retroactive sovereignty was primarily applied to countries that came under foreign occupations in the period of 1935 to 1945, a comparatively limited period. *See id.* at 418-19.

659. *See HENKIN ET AL., supra* note 86, at 1.

on formality rather than substance.⁶⁶⁰ The new statehood of these republics, therefore, resulted from either secession or the dismemberment of the Soviet Union.

Third, the Soviet republics that were willing to form a new union also constituted a case of state succession, because all of the projects for a new union treaty preserved these republics' sovereignty, and most of the former center's powers were turned over to them.⁶⁶¹

Does the RSFSR constitute a case of state succession? Arguably, the continued existence of the RSFSR may be regarded as a continuation of the Soviet Empire. After the breakdown of the Tsarist Empire, it was established that the RSFSR was the continuation of the Tsarist Empire.⁶⁶² The RSFSR was the heartland of both the Tsarist and Soviet empires. Comprising the majority of the Soviet territory and harboring half of its population, it had enormous political and economic weight at the beginning of, and during, the old union's existence.⁶⁶³ Thus, this proposition is not so far-fetched.⁶⁶⁴ The fact that the RSFSR did not declare independence, and that it seized most of the powers of the former union, further confirms this theory of continuity.

2. State Succession: Treaties and Debt

a. *Treaties*

The *Restatement (Third) of the Foreign Relations Law of the United States*⁶⁶⁵ adopts the principle that a new state that was originally part of another state does not succeed to the international treaties of the predecessor state.⁶⁶⁶ The Vienna Convention on Succession of States in Respect of Treaties⁶⁶⁷ also adopts this "clean slate" the-

660. See *supra* notes 131-37 and accompanying text.

661. See the analysis of the pre-coup draft treaties *supra* part VI.G.

662. See CRAWFORD, *supra* note 14, at 405. This was the case despite a revolutionary change of government, as well as partial territorial disruption. See *supra* notes 119-30 and accompanying text.

663. See *supra* notes 119-37 and accompanying text; see also Lloyd, *supra* note 557.

664. Similarly, Turkey was regarded as a continuation of the former Ottoman Empire, and the United Kingdom continued as the same state despite the loss of its empire in the first half of the 20th century. See CRAWFORD, *supra* note 14, at 404.

665. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

666. *Id.* § 210(3).

667. *Convention on Treaty Succession*, *supra* note 77. This convention is not yet in force.

ory.⁶⁶⁸ However, its application is limited to so-called "newly independent states,"⁶⁶⁹ which the convention defines as "dependent territory for the international relations of which the predecessor State was responsible."⁶⁷⁰ In other words, only colonies that had no voice in making international agreements do not succeed to the international treaties of their predecessors.⁶⁷¹ Separation of states outside the context of colonialism is governed by article 34 of the Vienna Convention on Succession of States in Respect of Treaties, which provides for the continuing validity of treaties concluded by the predecessor state.⁶⁷² Whether the Soviet republics had the status of colonies is unclear.⁶⁷³ If they did not, the rules of the convention imply that the republics continue to be bound by the international obligations of the Soviet Union, even if the republics severed their ties with the Soviet Empire. However, actual state practice has not always followed that rule.⁶⁷⁴ Given that the convention is not yet in force, and that its solution regarding state succession for new states does not reflect a well-settled rule in international law, such a proposition has no solid ground. Moreover, the "clean slate" theory is appealing to all newly emerging states because it preserves their sovereignty and provides them with a broader scope of action in relations with other states. These are considerable incentives for the former Soviet republics to follow the "clean slate" approach. Only the RSFSR, if regarded as the continuation of the Soviet Union, would be bound by the Soviet Union's treaties according to these theories.⁶⁷⁵

668. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 210 cmt. f (1987).

669. See *Convention on Treaty Succession*, *supra* note 77, arts. 16-30.

670. *Id.* art. 2(1)(f).

671. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 210 (1987).

672. *Convention on Treaty Succession*, *supra* note 77, art. 34.

673. See *supra* note 318 and accompanying text.

674. After Singapore's separation from Malaysia in 1965, Singapore acted as a newly independent state and only accepted international obligations to which it consented, despite the fact that it was not a colony of Malaysia. See HENKIN ET AL., *supra* note 86, at 517. See generally L.C. Green, *Malaya/Singapore/Malaysia: Comments on State Competence, Succession and Continuity*, IV CAN. Y.B. INT'L L. 3 (1966).

675. See *Convention on Treaty Succession*, *supra* note 77, art. 35. However, article 35 provides exceptions to the rule of continuing validity of treaties in cases of state succession: (1) the states concerned may agree to revoke the treaty; (2) if the treaty relates to a territory that has separated from both the predecessor and the successor state, the treaty remains in force in that territory only; and (3) if continuing validity is incompatible with the treaty's purpose or radically changes the conditions for its operation, it is no longer valid. *Id.*

b. Public Debt

The rules of international law regarding state succession in the area of public debt are even more nebulous. The *Restatement (Third) of the Foreign Relations Law of the United States* reflects the prevailing views of international law scholars regarding succession to public debt.⁶⁷⁶ It states the principle that public debt, as well as rights and obligations under contracts, remain with the successor to a state that no longer exists.⁶⁷⁷ Consequently, the RSFSR must assume the union's public debt.⁶⁷⁸ Only debt that is "local" in nature is the republics' responsibility.⁶⁷⁹ A confederation of the republics might assume some of the former public debt, but it would not have to do so. Further, its creditors would not have to accept the confederation as a new debtor.⁶⁸⁰

The former Soviet Union's debt problem could also be resolved by a moratorium. However, this would isolate the former Soviet republics from the much needed financial assistance of the international community, and would undermine their desire to become members of the International Monetary Fund and the World Bank. Therefore, in order to prevent the RSFSR from bearing the entire burden, the former Soviet Union's debt should be apportioned among the republics. According to international law, the republics have a good faith obligation to start negotiations aimed at apportionment.⁶⁸¹

676. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 209(2) (1987).

677. *Id.* In 1983, the Convention on the Succession of States in Respect of State Property, Archives and Debts was adopted in Vienna. See Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts, Apr. 7, 1983, 22 I.L.M. 298 [hereinafter Convention on Succession in Respect of State Property]. The controversial solutions that this convention provides do not reflect current state practice. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 209 reporters' notes 4, 8 (1987).

678. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 209(2)(c) cmt. d (1987). The convention basically provides for the same solution, which may be considered a rule of customary international law. See VERDROSS & SIMMA, *supra* note 74, §§ 1006-1008.

679. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 209(2)(c) & cmt. d (1987); see also HENKIN ET AL., *supra* note 86, at 268-69 (stating that no instance has been found in which a separating state has succeeded to the national debt).

680. But see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 209 (2) & reporters' note 6 (1987) (providing for the possibility of special agreements between predecessor and successor states to apportion the debt).

681. See *id.* § 209 cmt. e; Convention on Succession in Respect of State Property, *supra* note 677, arts. 39-41. Thirteen republics decided in September 1991 to start talks on the former Soviet Union's foreign debt, and on its gold, diamond, and foreign currency reserves. See Freeland, *supra* note 608.

Apportionment may present complications. For example, the "clean slate" approach to public debt⁶⁸² might complicate apportionment if the republics that consider themselves former Soviet colonies refuse to assume any debt at all. Another complication might arise as to public debt owed to private creditors. The prevailing view in international law is that the rules of succession apply to all debts, including those to public creditors, such as states and international organizations, and those to private creditors, such as individuals and corporations.⁶⁸³ The minority view advocates limiting the duty of repayment to public creditors only.⁶⁸⁴ Since the republics need comprehensive international financial assistance, and public and private investments, to build a market economy, the republics must avoid creating doubts about their reliability and creditworthiness. Thus, they should address the debt issue in the framework of debt agreements.

D. Problems of International Representation and Membership in International Organizations

1. International Representation in General

In the latter half of 1991, the Soviet Union more or less yielded its monopoly of international representation.⁶⁸⁵ Accordingly, the republics attempted to represent themselves in international relations, including international organizations.

States are the basic entities in international law.⁶⁸⁶ They have status as legal persons, including the capacity to become members of

682. Article 38 of the Convention on the Succession of States in Respect of State Property, Archives and Debts endorses this approach. It states:

When the successor State is an newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between them provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

Convention on Succession in Respect of State Property, *supra* note 677, art. 38. This provision was one of the reasons why many countries chose not to sign the convention. See VERDROSS & SIMMA, *supra* note 74, § 1008.

683. See RESTATEMENT (THIRD) OF THE FOREIGN RELATION LAW OF THE UNITED STATES § 209 cmt. b & reporters' note 4 (1987).

684. *Id.* This view was endorsed in article 30 of the Convention on the Succession of States in Respect of State Property, Archives and Debts, and was a further reason why many countries refused to sign the convention. See Convention on State Succession in Respect of State Property, *supra* note 677, art. 33.

685. See *supra* text accompanying notes 647-48.

686. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 introductory note (1987).

international organizations, conclude treaties with other countries, and contribute to the creation and further development of international law.⁶⁸⁷ Thus, the issues of international representation and statehood are intertwined. A union of states lacking the attributes of statehood may represent its members, but the union often acts on behalf of the states rather than on its own behalf.⁶⁸⁸ Thus, the capacity to assume international rights and obligations remains with the member states. On the other hand, it is recognized that an international organization may have its own legal personality in international law and may exercise international legal capacity.⁶⁸⁹ In the framework of the EC, for example, the European Court of Justice has held that the members of the EC lost their capacity to negotiate international agreements in some areas falling under the EEC Treaty.⁶⁹⁰ However, the acts of an international organization must be within the scope of its authority, as defined in the treaty creating the organization.⁶⁹¹ International law does not recognize an "objective legal personality" where the organization performs sovereign international legal acts irrespective of its constitutional framework.⁶⁹²

The former Soviet republics could have decided to establish an international organization that would represent them in their relations with other countries.⁶⁹³ Alternatively, they could have authorized the RSFSR to perform international acts on their behalf, based on an agency or representation relationship,⁶⁹⁴ as in the period of 1918 to 1922.⁶⁹⁵ Finally, they could have unified international repre-

687. See *id.* § 206.

688. This situation differs from that of a sovereign union of states that delegates treaty making power to its component entities. See *supra* notes 82-86 and accompanying text; see also HENKIN ET AL., *supra* note 86, at 273-74 (quoting Humphrey Waldock, *Report on the Law of Treaties*, [1962] 2 Y.B. Int'l L. Comm'n 27, 36, U.N. Doc. A/CN.4/SER.A/1962 (distinguishing between treaty making power delegated to the component entities of a sovereign union of states, and a genuine international personality, which includes treaty making power)).

689. See, e.g., Advisory Opinion No. 4, *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11).

690. See Case 22/70, *Commission v. Council*, 17 E.C.R. 263 (1971); see also *supra* note 467.

691. See HENKIN ET AL., *supra* note 86, at 333.

692. *Id.*

693. For a definition of international organizations, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 221 (1987).

694. See CRAWFORD, *supra* note 14, at 240 (discussing the dissolution of the British Empire and the British government's performance of acts on behalf of some dominions).

695. For a discussion of the RSFSR's relationship to the other republics in this period, see *supra* text accompanying notes 131-37.

sensation based on a confederative structure.⁶⁹⁶ All of these options did not change the fact that, in the latter half of 1991, the newly sovereign republics became free to decide how to conduct their foreign affairs, and that international law had to defer to their choices. As such, the republics were able to represent themselves in the international arena.

2. Representation in International Organizations

Representation in international organizations is primarily ruled by these organizations' regulations of membership.⁶⁹⁷ Thus, these organizations may set rules limiting or imposing conditions on membership.⁶⁹⁸

Most international organization foundation treaties allow membership of states only, and exclude other international entities from formal participation.⁶⁹⁹ The United Nations Charter, for instance, states that "[m]embership in the United Nations is open to all [other] peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."⁷⁰⁰ The charter allows membership of countries only, and denies membership to entities lacking the attributes of statehood.⁷⁰¹ It was therefore impossible for all of the Soviet republics and the crumbling Soviet Union to be simultaneous members of the United Nations. This implied that the republics that were still part of the Soviet Union could not apply for formal membership in the United Nations while the Soviet Union existed as a state.⁷⁰² Therefore, it was necessary to deprive the Soviet Union of

696. The former Soviet republics could have done this by establishing a confederation with a unified foreign policy. See *supra* notes 96-98 and accompanying text.

697. This is confirmed in the Vienna Convention on Succession of States in Respect of Treaties, which precludes the convention's rules on state succession from affecting rules concerning membership in an international organization and "any other relevant rules of the organization." *Convention on Treaty Succession*, *supra* note 77, art. 4.

698. *Id.*

699. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 221 (1987).

700. U.N. CHARTER art. 4, ¶ 1.

701. However, some nongovernmental organizations have observer status in the United Nations, and enjoy privileges pursuant to article 71 of the United Nations Charter. See *id.* art. 71. For a discussion of Ukrainian and Byelorussian membership in the United Nations, see *supra* notes 179-85 and accompanying text.

702. The experiences of Ukraine and Byelorussia may not affect the legal position of the other former Soviet republics as to their membership in the United Nations, since the admission of these two republics resulted from political compromise. See *supra* notes 179-85 and accompanying text.

the attributes of statehood in order to enable all of the republics to seek membership in the United Nations. Even then, such membership was subject to the approval of the Security Council, including the five permanent members,⁷⁰³ and a two-thirds majority vote in the General Assembly.⁷⁰⁴

If the RSFSR succeeds the old union,⁷⁰⁵ it could assume the Soviet Union's rights and obligations in international organizations, including its veto power in the United Nations Security Council. In such a case, all of the other republics would have to apply for membership formally. Those who believe that the RSFSR will succeed to the position of the Soviet Union presume that international organizations allow automatic membership of a successor state. Yet, this is often not the case. In many instances, successor states have had to ask for formal membership.⁷⁰⁶ An inquiry into the practice of the United Nations⁷⁰⁷ further reveals that law and charter interpretation are sometimes subordinate to political and administrative convenience.⁷⁰⁸ Syria's merging with Egypt in 1958 in the short-lived United Arab Republic illustrates this inconsistency. Syria resumed its formal status as an independent state in 1961, and was readmitted to membership in the United Nations without formal procedure.⁷⁰⁹ In contrast, Singapore seceded from Malaya, and had to apply for formal membership, while Malaysia, as successor to the Federation of Malaya, kept the latter's seat in the United Nations.⁷¹⁰ The Baltic states had to apply for membership in the United Nations,⁷¹¹ as did Pakistan when it broke from India.⁷¹² India, which was one of the founding members of the United Nations, gained independence from the British Empire at almost the same time that Pakistan broke from India.⁷¹³ Nevertheless, India did not have to apply formally for mem-

703. One of these permanent members was the Soviet Union. The RSFSR could assume its position. See *infra* notes 729-46 and accompanying text.

704. See U.N. CHARTER art. 4, ¶ 2.

705. See *supra* notes 662-64 and accompanying text.

706. See HENKIN ET AL., *supra* note 86, at 340.

707. See L.C. Green, *The Dissolution of States and Membership of the United Nations*, in *LAW, JUSTICE AND EQUITY: ESSAYS IN TRIBUTE TO G.W. KEETON* 152 (R.H. Code Holland & G. Schwarzenberger eds., 1967).

708. *Id.* at 167.

709. *Id.* at 162-66.

710. *Id.* at 161.

711. See *supra* text accompanying notes 544-48.

712. Green, *supra* note 707, at 159-62.

713. *Id.* at 159.

bership.⁷¹⁴ This caused a Polish delegate to remark that this could not be regarded as a "precedent in the event of another state splitting up into a few states, thereby depriving the Security Council of the privilege of making recommendations with regard to new members."⁷¹⁵ This criticism led the Legal Committee of the General Assembly to declare that no member ceases to exist merely because of constitutional or frontier changes.⁷¹⁶ The committee added that if a new state were created, it would have to apply formally for membership, regardless of whether it constituted formally a part of a member state's territory.⁷¹⁷ When the Soviet Union was dissolved formally, the various bodies of the United Nations, following this recommendation, agreed that the RSFSR could assume the Soviet Union's position without formal procedures and that all of the other republics had to apply for formal membership.⁷¹⁸

IX. THE ESTABLISHMENT OF THE COMMONWEALTH OF INDEPENDENT STATES

A. *The Way to the Commonwealth of Independent States*

The Soviet Union ended as a state on December 21 and 22, 1991, when the presidents of eleven republics, meeting in the Kazakhstani capital, Alma Ata, signed several agreements establishing the CIS.⁷¹⁹ These agreements definitively revoked the 1922 Union Treaty, which had constituted the legal basis for the Soviet Union.⁷²⁰ On December 26, 1991, Mikhail Gorbachev resigned as the last president of the So-

714. *Id.* at 159-62.

715. *Id.* at 160 (quoting U.N. SCOR, 2d Sess., 186th mtg. at 2055, U.N. Doc. S/496 (1947)).

716. *Id.* at 161-62.

717. *See id.* at 162.

718. *Das endgültige Ende der Sowjetunion [The Final End of the Soviet Union]*, NZZ, Dec. 23, 1991, at 1.

719. All of the republics, except Georgia and the three Baltic states, signed these agreements. *See* Gillian Tett & John Lloyd, *Republican Leaders to Sign Pact Today*, FIN. TIMES, Dec. 21-22, 1991, at 2; John Lloyd & Gillian Tett, *11 Soviet Republics Agree to End Union*, FIN. TIMES, Dec. 23, 1991, at 1.

720. Article 25 of the 1922 Union Treaty provided for special amendment procedures. *See* 1922 Union Treaty, *supra* note 144, art. 25. However, it did not allow for the revocation of the treaty by its component entities. One may draw several conclusions from the absence of a revocation provision, including (1) revoking the treaty was inconceivable to its drafters; (2) the republics retained the option to dissolve the union; and (3) the drafters wanted to exclude the possibility of dissolving the union. Given that the drafters designed the 1922 Union Treaty to play a continuing role during the existence of the union, a fact confirmed by President Gorbachev's proposal to substitute a new union treaty for the 1922 Union Treaty, the second construction appears to be the most accurate. Further, this construction corresponds with

viet Union. Where the old regime's institutions were not taken over by the RSFSR, they disappeared.⁷²¹ As a consequence, the Soviet Union ceased to exist, both as a state and as a subject of international law.

President Gorbachev's desperate attempts to halt the disintegration process and to preserve a closer union among the republics were doomed from the beginning,⁷²² as they did not reflect the new political realities of the post-coup era. The overwhelming vote of the people of Ukraine, the second largest republic, for full independence on December 2, 1991,⁷²³ was decisive for the complete disintegration of the Soviet Union.⁷²⁴ After this vote, the Ukrainian parliament decided that it would not even consider President Gorbachev's draft treaties.⁷²⁵ Also, other countries recognized Ukraine as an independent state almost immediately after the republic voted for full independence.⁷²⁶

A few days after Ukraine's vote, the presidents of the three Slavic republics, Russia, Ukraine, and Byelorussia, met in the Byelorussian capital of Minsk to conclude an agreement that would create a commonwealth of independent states and abolish the old union, replacing it with a republic-based, coordinative structure.⁷²⁷ This agreement

Lenin's concept of self-determination, with the fact that each republic retained the right to secede, and with the concept of republic sovereignty. See *supra* notes 106-08, 155.

721. See John Lloyd, *Stresses Threaten Unity of Former Soviet Republics*, FIN. TIMES, Dec. 27, 1991, at 1.

722. These attempts included a pact on an economic union that was signed by 8 of the 12 Soviet republics on October 18, 1991, but never ratified by them. See *8 of 12 Soviet Republics Sign Pact on Economic Union*, INT'L HERALD TRIB., Oct. 19-20, 1991, at 1. They also included an abortive creation of a confederative Union of Sovereign States among 7 of the 12 Soviet republics. See Francis X. Clines, *Gorbachev Fails to Forge Pact of Political Union*, FIN. TIMES, Nov. 26, 1991, at 1.

723. See Chrystia Freeland et al., *Ukraine Votes for Full Independence by 9 to 1*, FIN. TIMES, Dec. 3, 1991, at 1.

724. See John Lloyd, *USSR RIP*, FIN. TIMES, Dec. 4, 1991, at 16. It also implied the end of the 300-year-old Slavic union of Russia, Byelorussia, and Ukraine. See *Time to Help the Republics*, FIN. TIMES, Dec. 3, 1991, at 20.

725. See Chrystia Freeland & John Lloyd, *Ukraine Votes to Ignore Draft Union Treaty*, FIN. TIMES, Dec. 7-8, 1991, at 2.

726. For example, Canada, Hungary, Romania, and Poland formally recognized Ukraine on December 3, 1991. See *Anerkennung der Ukraine durch Kanada [Recognition of Ukraine by Canada]*, NZZ, Dec. 4, 1991, at 2.

727. See John Lloyd et al., *Gorbachev Fights for His Political Survival*, FIN. TIMES, Dec. 10, 1991, at 1; see also John Lloyd, *Commonwealth with Little in Common*, FIN. TIMES, Dec. 10, 1991, at 18. The agreement was ratified by the Russian parliament on December 12, 1991. See John Lloyd, *Russia Endorses New Commonwealth*, FIN. TIMES, Dec. 13, 1991, at 1. At the same time, the parliament annulled the RSFSR's membership to the 1922 Union Treaty. See *Das Minsker Abkommen von Russland ratifiziert [The Minsk Agreement Ratified by Russia]*, NZZ, Dec. 13, 1991, at 1. The Ukrainian and the Byelorussian parliaments endorsed the

was the core of what less than two weeks later became the CIS, consisting of eleven republics of the former Soviet Union.⁷²⁸

B. Nature, Structure, and Organization of the Commonwealth of Independent States

The CIS is a loose confederation between the completely sovereign and independent former Soviet republics. It is an association of states based on international agreements concluded to institutionalize cooperation and coordination in various areas of common concern.⁷²⁹ Six documents constituting the political and legal basis of the CIS were signed in Alma Ata: (1) a protocol granting the non-Slavic members of the CIS formal status as founding members of the new confederative structure; (2) the Declaration of Alma Ata, which confirmed the agreement concluded in Minsk; (3) a protocol on conventional armed forces; (4) an agreement on coordinative institutions of the new confederation; (5) a document regulating representation of the former Soviet Union in the United Nations; and (6) a separate agreement between Russia, Byelorussia, Ukraine, and Kazakhstan, regulating control over the nuclear arsenal of the former Soviet Union.⁷³⁰ Additionally, the republics confirmed their commitment to basic principles, such as democracy, the rule of law, human rights, mutual recognition of territorial integrity, noninterference with internal affairs, and inviolability of the republics' borders.⁷³¹ Thus, international law became the only source of law for mutual relations among the former Soviet republics.

The CIS is equipped with a minimal institutional structure. The Alma Ata agreements provided for just two institutions: the Council of the Heads of State, which is the highest coordinating body of the confederation; and the Council of the Heads of Government, which is

agreement of Minsk on December 10, 1991. See *Ratifizierung des Abkommens in Minsk* [Ratification of the Agreement in Minsk], NZZ, Dec. 11, 1991, at 2.

728. With the Alma Ata agreements, the other republics willing to participate in the CIS were granted status as founding members of the Minsk agreement. See *Das endgültige Ende der Sowjetunion—Erweiterung der Minsker Gemeinschaft* [The Final End of the Soviet Union—Expansion of the Minsk Community], NZZ, Dec. 23, 1991, at 1.

729. For a comparison of the features of federations and confederations, see *supra* parts II.C, D.

730. See *The Final End of the Soviet Union—Expansion of the Minsk Community*, *supra* note 728, at 1. For the full text of the documents, see Armenia-Azerbaijan-Belarus-Kazakhstan-Kyrgyzstan-Moldova-Russia-Tajikistan-Turkmenistan-Uzbekistan-Ukraine: Agreements Establishing the *Commonwealth of Independent States*, 31 I.L.M. 138 (1992) [hereinafter *Agreements Establishing the Commonwealth of Independent States*].

731. *Id.*

responsible for interrepublic economic coordination.⁷³² According to the agreements, both bodies convene at least twice each year, and the ministers in the areas of interior, foreign affairs, defense, finance, and communication meet at least four times each year.⁷³³ There is no formal decision making or dispute settlement procedure, nor is there a common citizenship.⁷³⁴ Every new agreement between the republics requires ratification by the republics' legislatures.⁷³⁵ Thus, the confederation creates neither an independent legal order, nor an administration.⁷³⁶

It would be a misconception to equate the CIS with the agreements concluded in Minsk and Alma Ata. These documents merely continued and institutionalized a process of interrepublic cooperation and coordination that had already begun in 1990.⁷³⁷ They were designed to be supplemented by intergovernmental agreements, bilateral and multilateral treaties, contracts between state enterprises, and informal common understandings regarding problems with the economy, foreign affairs, security, deliveries of goods, transportation, and energy. All of these agreements, taken together, define the character of the CIS: a continuing and sometimes delicate process of loosely framed but institutionalized discussion, cooperation, and coordination.

This scheme confirms that the republics possess a plenitude of power and that they can act as fully sovereign states in domestic and foreign affairs. No supranational structure, such as in the EC, limits their power, because no powers were transferred to the CIS. *Kompetenzkompetenz*⁷³⁸ has ceased to be an issue. Absent any majority vote procedures in the CIS's coordinating bodies, each republic has the power to veto any decision.⁷³⁹ Thus, the Alma Ata agreements demonstrate that the former Soviet republics have become in-

732. *Id.*

733. *Id.*

734. *Id.*; see also Lionel Barber, *U.S. Doubts Success of Commonwealth*, FIN. TIMES, Dec. 23, 1991, at 1. There is also no common mechanism for economic policy reform. See Lloyd & Tett, *supra* note 719, at 1.

735. See John Lloyd & Gillian Tett, *Tentative Start to a Hazardous Journey*, FIN. TIMES, Dec. 23, 1991, at 2.

736. Moreover, its existence implies that the legal order of the former union and its administration have come to an end.

737. See *supra* part IV.F.

738. See *supra* text accompanying note 65.

739. This is the consequence of the consensus-dependent value of the CIS. See *supra* notes 729-36 and accompanying text.

dependent states,⁷⁴⁰ and that no "center" can challenge their powers.

With the establishment of the CIS, the Soviet Union ceased to exist as a state. Almost immediately thereafter, many members of the international community began to recognize at least some of the republics as independent states.⁷⁴¹ At the same time, the RSFSR was recognized as the legal successor to the former Soviet Empire under international law,⁷⁴² thus ensuring some continuity.⁷⁴³ Therefore, the RSFSR became bound by the international agreements and treaties concluded by the former Soviet Union, including most of the former union's debts. Due to the recognition of the RSFSR as the legal successor to the Soviet Union,⁷⁴⁴ it was also able to assume the Soviet Union's position in the United Nations and other international organizations.⁷⁴⁵ Moreover, all of the CIS member states subsequently became members of the Conference on Security and Co-Operation in Europe⁷⁴⁶ ("CSCE").

740. With the Alma Ata agreements, the republics fulfilled the prerequisites of statehood as defined in international law. They have defined territories, permanent populations, their own governments, and the capacity to conduct foreign affairs. For a discussion of the definition of statehood in international law, see *supra* note 67.

741. The Swiss government recognized all of the former Soviet republics as independent states on December 23, 1991, just one day after the signature of the Alma Ata agreements. See *Bern anerkennt ehemalige Sowjetrepubliken* [Bern Recognizes Former Soviet Republics], NZZ, Dec. 24, 1991, at 13. The United States formally recognized Russia, Ukraine, Byelorussia, Armenia, Kazakhstan, and Krigisia on December 25, 1991. The independence of the remaining Soviet republics was acknowledged, but the United States government decided not to establish full diplomatic ties until these republics had committed themselves to "responsible security policies and democratic principles." See George Graham, *Bush Moves to Set Up Links with Republics*, FIN. TIMES, Dec. 27, 1991, at 1. Many countries, including former allies of the Soviet Union, such as the People's Republic of China and Cuba, recognized all or most of the Soviet republics before the end of 1991. See *Japan erkennt Russland an* [Japan Recognizes Russia], NZZ, Dec. 28-29, 1991, at 3.

742. The United States, Germany, and the EC quickly recognized this role of the RSFSR, whereas some republics, particularly Ukraine, showed resistance. See John Lloyd, *supra* note 721.

743. See *supra* notes 663-64 and accompanying text. Absent any attributes of statehood and a capacity to conduct foreign affairs, the CIS could not assume this position.

744. See *The Final End of the Soviet Union*, *supra* note 718, at 1; see also *infra* notes 787-94 and accompanying text.

745. See *The Final End of the Soviet Union*, *supra* note 718, at 1; see also *infra* notes 787-94 and accompanying text. For a discussion of the problems of state succession in international treaties, public debt, and international organizations, see *supra* parts VIII.C, D and *infra* part IX.E.

746. See *Aufnahme aller GUS-Mitglieder in die KSZE* [Admission of all GUS Members to the CIS], NZZ, Jan. 31, 1992, at 1.

C. *Purposes and Goals of the Commonwealth of Independent States*

The CIS has been described as a cooperative defense alliance, with joint economic policies.⁷⁴⁷ Yet, it must also address the intricate implications of the breakdown of the highly centralized Soviet Union. The complicated interdependencies created under the Communist regime continue to constrain the former republics, and allow them only a narrow scope of action. As such, to overcome the legacy of the Communist system of government, the republics are forced to compromise.

Absent a center, which in earlier times could be held responsible for misgovernment and mismanagement, the line of conflict has shifted from the vertical to the horizontal level. All of the problems of the former Soviet Union now burden interrepublic relations. For instance, only a few days after the conclusion of the Alma Ata agreements, serious tensions arose among Russia and the other former Soviet republics, particularly Ukraine. These conflicts concerned defense and the economy, both central issues to the confederation.⁷⁴⁸ The areas of interrepublic conflicts also include fears of domination by Russia, ethnic tensions and minority problems,⁷⁴⁹ border disputes,⁷⁵⁰ conflicting territorial claims,⁷⁵¹ economic policies,⁷⁵² internal customs barriers and delays in delivery causing shortages of basic goods,⁷⁵³ a common currency,⁷⁵⁴ the future of the Soviet army and its immense arsenal of weaponry, the Black Sea fleet,⁷⁵⁵ republic mili-

747. See Barber, *supra* note 734.

748. See Lloyd, *supra* note 721 (mentioning disagreements regarding the future role of Russia as the only republic in possession of nuclear weapons, and the Russian price liberalization program for goods and services); see also Serge Schmemmann, *Forming a Commonwealth: Now Comes the Hard Part*, INT'L HERALD TRIB., Dec. 30, 1991, at 1.

749. See John Lloyd, *Commonwealth 'Too Frail to Withstand the Forces of Nationalism'*, FIN. TIMES, Dec. 27, 1991, at 4.

750. See Gillian Tett, *'Undeclared War' Threat to Azerbaijani Independence*, FIN. TIMES, Dec. 28-29, 1991, at 3 (discussing the Nagorno-Karabakh dispute between Azerbaijan and Armenia).

751. See Chrystia Freeland, *Drive to Restrain Crimean Separatists*, FIN. TIMES, Feb. 6, 1992, at 2 [hereinafter Freeland, *Crimean Separatists*]; Chrystia Freeland, *Crimea Is a Wild Card in a Lethal Game*, FIN. TIMES, Feb. 10, 1992, at 12 [hereinafter Freeland, *Crimea Is a Wild Card*].

752. See John Lloyd, *Russia Angers New Union*, FIN. TIMES, Dec. 28-29, 1991, at 1.

753. See John Lloyd, *Russia Bans Export of Goods in Short Supply*, FIN. TIMES, Jan. 10, 1992, at 14 (reporting on measures taken by the Russian government to ban export of goods in retaliation against republics that had erected trade barriers).

754. See John Lloyd & Robert Graham, *'Chaos and Collapse' Until Monetary Union Is Agreed*, FIN. TIMES, Dec. 21-22, 1991, at 2.

755. See Leyla Boulton, *Battle for Black Sea Fleet Threatens Commonwealth*, FIN. TIMES,

tias,⁷⁵⁶ and political rivalries between republic leaders, particularly the presidents of Ukraine and Russia.⁷⁵⁷ Currently, the republics often make unilateral decisions, even where they adversely affect other members of the CIS, rather than cooperate within the framework of the new common structure. These issues, combined with the tendency toward unilateralism, provoke countermeasures and retaliation, and put enormous strains on the stability of the CIS. The consensus-dependent nature of the confederation, in which compulsory decision making and dispute settlement procedures do not exist, makes it extremely difficult to resolve these issues.

D. The Roles of the Commonwealth of Independent States and the Independent States in International Law and Politics

The member states of the CIS also face important changes in their roles in international law and politics. As a result of the Soviet Union's disintegration, fifteen new states emerged, and a superpower disappeared from the world community. The former republics have entered the international arena, but the CIS has not. Since it lacks the capacity to conduct foreign affairs or assume international obligations, the CIS is, unlike the EC, purely internal in nature, and merely regulates some relations among the former Soviet republics. Therefore, it did not apply for membership in international organizations, and it does not participate in international conferences or international agreements.⁷⁵⁸

Most of the newly independent states have become members of the United Nations.⁷⁵⁹ With the exception of Georgia, all of them have become members of the CSCE, and have expressed their intention to continue the Helsinki process, with its implications for peaceful settlement of disputes, and respect for territorial integrity, human

Jan. 6, 1992, at 1; John Lloyd, *Struggle for Control of Black Sea Fleet Intensifies*, FIN. TIMES, Jan. 10, 1992, at 1; John Lloyd, *Republics Settle Naval Quarrel*, FIN. TIMES, Jan. 13, 1992, at 1.

756. See Leyla Boulton & Chrystia Freeland, *Ukraine Rejects Officers' Call for United Army*, FIN. TIMES, Jan. 20, 1992, at 1.

757. See Chrystia Freeland, *Black Sea Fleet Becomes Post-Soviet Battleground*, FIN. TIMES, Jan. 20, 1992, at 2.

758. The CIS, however, has participated in some nonpolitical events, including the 1992 Winter Olympic Games in Albertville, France. See Andrew Phillips, *A Transformed World Prepares for the Olympics*, MACLEAN'S, Feb. 3, 1992, at 21; Elizabeth Shogren, *Five Republics to Have United Team*, L.A. TIMES, Jan. 26, 1992, at C2.

759. Leyla Boulton, *Eight Ex-Soviet Republics Join United Nations*, FIN. TIMES, Feb. 28, 1991, at 12.

rights, democracy, and the rule of law.⁷⁶⁰ Some of the states have also announced their intention to become members of the Council of Europe.⁷⁶¹

"Europization" of the new states may contribute to the process of peacefully resolving interrepublic tensions, and may promote human rights, democracy, and the rule of law in these countries. The international and European structures may further alleviate some of the structural deficiencies of the CIS. Even though the organizational framework of the CSCE is not very elaborate, Europe is now better prepared to address the issues of interstate tensions and minority problems than in the past. The Charter of Paris for a New Europe, adopted on November 21, 1990,⁷⁶² set up new institutional arrangements for Europe. They included a CSCE Council, consisting of foreign ministers, which holds annual meetings; a Conflict Prevention Center; and an Office for Free Elections.⁷⁶³ In 1991, the CSCE members established a CSCE Parliamentary Assembly,⁷⁶⁴ mechanisms for consultation and cooperation with regard to emergency situations and the peaceful settlement of disputes,⁷⁶⁵ and procedures ensuring respect for human and minority rights.⁷⁶⁶ Moreover, the agreed rule of "consensus minus one"⁷⁶⁷ makes common efforts possible even against the objections of a member state. Thus, there are public fora

760. See *supra* note 244 and accompanying text.

761. See *Wo Sind die Grenzen Europas?* [*Where are the Borders of Europe?*], NZZ, Feb. 11, 1992, at 2.

762. Conference on Security and Co-Operation in Europe: Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190.

763. Conference on Security and Co-Operation in Europe: Supplementary Document to Give Effect to Certain Provisions Contained in the Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 209, 209-22.

764. Conference on Security and Co-Operation in Europe: Final Resolution of the Madrid Conference Concerning the Establishment of the CSCE Parliamentary Assembly, June 19-20, 1991, 30 I.L.M. 1344.

765. See Conference on Security and Co-Operation in Europe: Summary of Conclusions of the Berlin Meeting of the Council, Including Arrangements for Consultation in Emergency Situations and Peaceful Settlement of Disputes, June 19-20, 1991, 30 I.L.M. 1348.

766. See Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding, June 19-20, 1991, 30 I.L.M. 1670; see also Report of the CSCE Meeting of Experts on National Minorities, June 19-20, 1991, 30 I.L.M. 1692.

767. This deviation from the consensus principle that usually applied in the CSCE process allows the group to overrule a veto of a member state accused of violations of basic CSCE commitments. The rule was adopted at a meeting of the CSCE Council on January 31, 1992. See *Schlussfolgerungen des KSZE-Rats in Prag—"Konsensus minus eins"* [*Final Results of the CSCE Meeting in Prague—"Consensus Minus One"*], NZZ, Feb. 1-2, 1992, at 2.

available for discussion of the many issues currently burdening relations between the newly independent states.

Finally, the United Nations may also contribute to the peaceful resolution of conflicts and disputes among the former Soviet republics. Interrepublic relations have become a matter of international law and politics. When tensions among the republics affect international peace and security, they are a matter of international concern, particularly to the United Nations.⁷⁶⁸ They are no longer just a matter of domestic jurisdiction.⁷⁶⁹ Given the potential for tensions among the new states, third party involvement in dispute settlement procedures may contribute to the peaceful resolution of controversies. For example, the United Nations Security Council has the power to make recommendations on border disputes that could jeopardize international peace and security.⁷⁷⁰ Additionally, the Secretary General of the United Nations may provide a venue conducive to settlement or may propose conciliation procedures. Moreover, the International Court of Justice, a respected international authority for judicial adjudication, is also available.⁷⁷¹

These international institutions and procedures compensate for deficiencies in the arrangements made in Minsk and Alma Ata, particularly for the lack of dispute settlement procedures. They are already playing an important role in the process of stabilizing the territory of the former Soviet Union.⁷⁷²

E. State Continuity and State Succession Revisited

1. Continuity Between the Soviet Union and the Commonwealth of Independent States or Its Member States?

This Article proposes that continuity between the former Soviet Union and the emerging states is unlikely.⁷⁷³ The disintegration of

768. See U.N. CHARTER art. 1, ¶ 1.

769. *Id.* art. 2, ¶ 7.

770. See *id.* arts. 24, ¶ 1, 39, 40. The RSFSR, however, which took over the Soviet Union's seat as a permanent member of the United Nations Security Council, may utilize its veto power if the Security Council addresses the dispute between Russia and Ukraine over the Crimean peninsula. See Freeland, *Crimea Is a Wild Card*, *supra* note 751.

771. See Statute of the International Court of Justice, June 26, 1945, 59 Stat. 105, 93 U.N.T.S. 25. All members of the United Nations are *ipso facto* parties to the statute. See U.N. CHARTER art. 93.

772. See Ariane Genillard & Laura Silber, *CSCE Adopts Greater Role in Resolving Conflicts*, FIN. TIMES, Feb. 1-2, 1992, at 2 (reporting on the decision of the CSCE foreign ministers to send a CSCE fact-finding mission to the disputed Armenian enclave of Nagorno-Karabakh).

773. See *supra* part VIII.C.2.

the Soviet Union, accompanied by the emergence of fifteen new states, argues against identity and continuity. Due to an agreement among the Soviet Union's component members, the Soviet Union ceased to exist and its international personality was extinguished.⁷⁷⁴ The international community acknowledged this fact by recognizing the new states as members.⁷⁷⁵ Thus, the disintegration of the Soviet Union resulted in the succession of not one, but several new states. The CIS is not a state and, therefore, cannot assume the international legal and political position of the Soviet Union.⁷⁷⁶ As a result, continuity between the Soviet Union and the CIS is impossible.

2. Continuity Between the Soviet Union and the RSFSR?

As a state, the RSFSR is capable of assuming the Soviet Union's international role. The RSFSR's claims for legal heritage of the Soviet Union, and the fact that the RSFSR took over most of the union's institutions and never declared independence, support the idea of continuity between the RSFSR and the Soviet Union.⁷⁷⁷ The cases of other imperial states, such as the Ottoman Empire and the Dual Monarchy of Austria and Hungary, which were both dismembered after World War I,⁷⁷⁸ support this proposition. The general presumption among international lawyers and courts was that these empires were continued by Turkey and by Austria and Hungary, respectively.⁷⁷⁹

The assumption of the RSFSR's continuity of the Soviet Union is, however, problematic because the Soviet Union was dissolved by the conclusion of a formal agreement among the sovereign states that were its component entities.⁷⁸⁰ The process of disintegration resulted not only in the simultaneous emergence of fifteen states in the territory of the former Soviet Union, but also in the abolishment of the Soviet Union's central governmental structure, constitution, economic system, and legal system. In terms of institutional, legal, and

774. See *supra* notes 719-20 and accompanying text.

775. See *supra* notes 741-46 and accompanying text.

776. The CIS does not have the attribute of statehood, which is necessary for international recognition. Absent a governmental structure, it has no capacity to conduct foreign relations or to have rights and obligations under international law.

777. See *supra* notes 662-64 and accompanying text.

778. CRAWFORD, *supra* note 14, at 404.

779. See *id.*

780. Arguably, it might have been different if all of the republics, except the RSFSR, had seceded from the Soviet Union, with the RSFSR remaining as the sole member of the Union. In legal terms, however, the dissolution of the Soviet Union constituted a case of dismemberment, not secession. See *infra* part IX.E.3.

political structures, there is almost no continuity.⁷⁸¹ The transition from the Soviet Union to the fifteen states thus resulted in a comprehensive structural change extending to the government, territory, population, legal system, administrative structure, and ideological underpinnings of the Soviet Union. The basic features of the Soviet Union's political system ceased to exist. Moreover, an agreement concluded at Alma Ata regulated the replacement of the Soviet Union in international organizations by representatives of the RSFSR.⁷⁸² This would have been unnecessary if the members of the CIS agreed that the RSFSR would continue the existence of the Soviet Union.⁷⁸³

3. Secession or Dismemberment?

Identity and continuity between the Soviet Union and the RSFSR would also imply that the republics had seceded from either the Soviet Union or the RSFSR. Yet, such an assumption is unfounded. It is true that, at the outset of the disintegration process, conflicts arose between central authorities and some republics desiring separation from the Soviet Union. Subsequently, however, these conflicts took another shape, as they turned into a common effort by most of the republics to put an end to the Soviet Union. As a consequence, the Soviet republics in the Asian part of the Soviet Empire, which were earlier willing to continue a renewed union,⁷⁸⁴ lost their country when the Soviet Union ceased to exist. The Minsk and Alma Ata agreements were not concluded to regulate secession issues, but to end a common superstructure and establish further cooperation between equally sovereign states.⁷⁸⁵ Therefore, dismemberment, rather than secession, is the term that properly describes what happened to the Soviet Union. Thus, the transition from the Soviet Union to fifteen independent states, including the RSFSR, constitutes a case of state

781. Only the Red Army remains as an institutional legacy of the former Soviet Empire. However, even the army is undergoing a process of disintegration. See Boulton & Freeland, *supra* note 756, at 1.

782. See *supra* note 730 and accompanying text; Agreements Establishing the *Commonwealth of Independent States*, *supra* note 730, at 151.

783. The RSFSR's claims of legal heritage of the former Soviet Empire were challenged by the other republics. See *supra* note 742. Thus, the agreement regarding representation in international organizations was not just a confirmation of what the law was, but was an exceptional act of support for the RSFSR by the members of the CIS.

784. See *supra* notes 647-48 and accompanying text.

785. The documents signed were multilateral agreements between all of the states, not agreements between the RSFSR and the republics. See *supra* notes 719, 729-36 and accompanying text.

succession.⁷⁸⁶

4. The RSFSR's Claims for Legal Heritage

The RSFSR's declarations for inheritance of the Soviet Union's international position had important legal ramifications because they implied an assumption of the rights and privileges of the Soviet Union in international law and politics. At the same time, they calmed the international community's concerns about the prospects for disarmament and closer cooperation among the superpowers. The RSFSR's claims eliminated uncertainty about the performance of the agreements and treaties concluded by the Soviet Union because they implied that the RSFSR would consider itself bound by the Soviet Union's agreements and treaties.⁷⁸⁷ Thus, the RSFSR's claims were welcomed by many countries because they allayed fears that the RSFSR would apply the "clean slate" rule.⁷⁸⁸

The RSFSR's declarations implied the assumption of universal succession. Yet, some questions remain as to whether such a unilateral declaration creates legal obligations for the parties to a treaty, or whether the other parties must also express their consent. A state's unilateral declaration may create international obligations for that state, but it usually will not impose legal obligations on other states.⁷⁸⁹ Section 1 of article 9 of the Vienna Convention on Succession of States in Respect of Treaties⁷⁹⁰ confirms this rule of international law. It states that a unilateral declaration providing for the continuation of treaties concluded by a predecessor state does not per se result in the devolution of treaty obligations or rights from the predecessor to the successor state.⁷⁹¹ However, according to the convention, there is almost no difference between state succession and continuity outside the context of decolonization. In both, the state remains bound by the

786. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 cmt. b (1987) (defining the term "successor state" as a state "that arises because of the dismemberment of the state of which it had been a part").

787. Unilateral declarations were also made by many of the newly independent states that emerged in the process of decolonization. They allowed the provisional application of the treaties concluded by the colonial powers, and gave the new states a grace period for the determination or adoption of these international commitments. See HENKIN ET AL., *supra* note 86, at 506-07. Contrary to the RSFSR's declaration, these declarations were not designed to create a general assumption of universal succession. *Id.*

788. See *supra* notes 742-43 and accompanying text.

789. See Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20).

790. See *Convention on Treaty Succession*, *supra* note 77, art. 9(1).

791. *Id.*

treaties concluded by the predecessor state. However, there are two exceptions to this rule that apply to a successor state: (1) treaties that are local in nature and refer to a part of a separating territory bind that territory only;⁷⁹² and (2) treaties that become incompatible as to their goals and purposes, due to a change in the international status of a territory, are unenforceable.⁷⁹³ Undeniably, the break-up of the Soviet Union has caused the renegotiation of some international agreements, either because their purposes and goals can no longer be achieved, or because their conditions of operation have radically changed. Both the RSFSR and the parties to the treaties concluded that the Soviet Union should not be bound by legal commitments that became inoperable because of the break-up of the Soviet Union. The exceptions provided by the convention give some guidance as to the termination or renegotiability of international agreements to which the Soviet Union was a party.⁷⁹⁴

The other new states did not make any similar statements about their adherence to treaties concluded by the Soviet Union. It appears that they will decide which treaty relations to continue on an ad hoc basis. This implies that these states consider themselves former dependent territories, or that they reject the convention's idea that a "clean slate" applies only to dependent territories. In many instances, however, these states may, by a notification of succession, establish their status as a party to multilateral treaties.⁷⁹⁵

*F. Does the Commonwealth of Independent States Establish an Equilibrium?*⁷⁹⁶

The CIS represents an unprecedented structural change from a

792. *Id.* arts. 34(1), 35.

793. *Id.* arts. 34(2), 35.

794. Articles 34 and 35 of the Vienna Convention on Succession of States in Respect of Treaties define a *rebus sic stantibus* clause in the particular case of territorial changes, such as secession or dismemberment of a state. *See id.* arts. 34, 35. For a general discussion of *rebus sic stantibus*, see article 62 of the Vienna Convention on the Law of Treaties, which narrowly defines it as a radical and unforeseeable change in the circumstances that constituted an essential basis for the consent of the parties bound by a treaty, and that radically transforms the extent of the obligations still to be performed under the treaty. *See* Vienna Convention on the Law of Treaties, *supra* note 71, art. 62. Thus, the field of application of article 62 is narrower than that of articles 34 and 35 of the Vienna Convention on Succession of States in Respect of Treaties.

795. *See* Convention on Treaty Succession, *supra* note 77, art. 17.

796. Some of the ideas expressed in this paragraph are based on the ideas of Stephan Kux, *Confederalism and Stability in the Commonwealth of Independent States*, in *WORLD POL'Y J.* (forthcoming Summer 1992) [hereinafter Kux, *Confederalism and Stability*], and Stephan

federation to a confederation. This implies a shift from (1) subordinate to coordinative relations; (2) heteronomy to autonomy; (3) centralist domination to equality and sovereignty; (3) vertical to horizontal decision making procedures; (4) foreign rule to republic self-determination; (5) national to international law; (6) and a legal and administrative hierarchy to relations based on contracts between independent states. As a compromise between the republics' aspirations for full independence and sovereignty, and the need to address common problems, the CIS reflects the lowest common denominator of the new states. It preserves the states' drive for self-determination, sovereignty, and independence, but also provides an institutional and normative framework for discussion and cooperation among them. Moreover, it gives the new states a chance for emancipation and the development of a national identity. Thus, the CIS may vitalize a culture of federalism, or "proto-federalism," as scholar Stephan Kux labels it.⁷⁹⁷

Despite widespread skepticism as to the viability of the CIS, the cautious approach of institutionalized, agreement-based cooperation has contributed to stability in the former Soviet Union. The CIS is the logical result of a consistent process of disintegration, which affected more and more union institutions, while republic government structures and interrepublic solidarity became stronger. The CIS put a formal end to the old union, and halted a sometimes violent power struggle between the Soviet Union's member states and the central government of the union, which had paralyzed the socialist federation and attempts for reform. In this regard, the establishment of the CIS contributed to political stability.

Yet, the balance created by the CIS is delicate. Confederations tend to destabilize if they lose the continuing support and good will of their sovereign member states, or if the institutional arrangements result in an inadequate decision making capacity. The foundation and the legitimacy of a confederation consists of the convergence of interests in areas of common concern. A confederation is usually unable to go beyond the common will of its members. It lacks its own power base and does not create a legal order. Because a confederation is not

Kux, *Decline and Reemergence of Soviet Federalism*, in 21 ZÜRCHER BEITRÄGE ZUR SICHERHEITSPOLITIK UND KONFLIKTFORSCHUNG [Zurich Contributions to Security Policy and Conflict Studies] (1991).

797. See generally Kux, *Confederalism and Stability*, *supra* note 796.

equipped with a governmental structure, its decision making processes are often slow and complicated.

For all of these reasons, the problem solving capacity of a confederation is limited. Such a framework often does not meet the long-term needs of its component entities. Historically, a confederation was often a transitional organization that either became a state, like Switzerland or the United States,⁷⁹⁸ or fell apart, like the United Arab Republic.⁷⁹⁹

In order to ensure long-term viability, a confederation must have an adequate problem solving structure. This structure's powers, decision making procedures, efficiency, and mechanisms for implementation and enforcement should match the political, economic, and social problems at issue. In terms of problem solving capacity, the compromise reached in Minsk and Alma Ata only partially met the structural requirements necessary to overcome the problems of the former Soviet Union. The CIS embodies what Kux labels "federalism a la carte": Each republic may determine its own position within the loose network of agreements, by deciding whether it will cooperate in each case.⁸⁰⁰ This system of diversity makes uniform policies impossible. Therefore, in the long run, the CIS is not a viable structure for solving the numerous economic, political, and social problems that the new states face. As such, the CIS will probably be merely transitional in nature.

The transition process in the former Soviet Union has taken place in a surprisingly peaceful manner. However, serious interrepublic tensions are going to persist. Moreover, the political systems of some of the new nations are unstable. One also cannot rule out attempts by the RSFSR to dominate the CIS, the complete breakdown of the CIS due to disagreement over common policies, or a new dictatorship in the RSFSR.⁸⁰¹ The new states' increasing integration into European structures and international organizations may contribute to further stabilization, which will benefit the people living in these newly emerging states.

798. See CRAWFORD, *supra* note 14, at 292 n.26.

799. See *id.* at 294-95.

800. See Kux, *Confederalism and Stability*, *supra* note 796. President Gorbachev had something comparable in mind in his last drafts for a new union treaty. However, his idea was that the Soviet Union would continue to be a state. See *supra* note 722.

801. See Ian Davidson & Quentin Peel, *Yeltsin Raises Spectre of New Dictatorship*, FIN. TIMES, Feb. 7, 1992, at 2.

X. CONCLUSION: THE TRANSITION FROM A FEDERATION TO A CONFEDERATION

The amazing and often dramatic events in the Soviet Union since 1988 have provided a unique opportunity to study the legal implications of a federated country's center-periphery problems. An analysis of federalism establishes that the Soviet Union was a particular type of federation: a socialist federation, based on a union treaty between several republics, and interspersed with significant confederative elements. These confederative elements included (1) the right of each republic to secede; (2) references in the union's constitution to self-determination of the "people" and the sovereignty of the republics; and (3) the continuing validity of the union treaty even after the enactment of a constitution. All of these elements potentially preserved the right of the Soviet republics to determine the extent of their affiliation with the union, and indicated that the republics agreed only reluctantly to form the union in 1922. Theoretically, the republics had the option to leave the union at any time.

Yet, following the creation of the federation, its centralizing forces began to play a more important role. The republics lost their political ability to question the compromise reached. It was particularly difficult for them to express discontent, or to change the federated equilibrium by using political and legal procedures. Because political forces advocating republic autonomy were absent, and problem solving mechanisms were inadequate, federalism in the Soviet Union lost its viability.

It is therefore not surprising that the process of disintegration, beginning with the decay of the societal underpinnings of socialist federalism, could not be stopped within the socialist legal framework. The legal and political system did not provide adequate mechanisms to solve center-periphery conflicts or to redefine an equilibrium between the union and the Soviet republics. Further, the 1977 Constitution was considered illegitimate because it furthered the empty federal compromise reached in 1922. In some respects, this situation brought the Soviet Union back to 1922, when the first union treaty was concluded. The republics increasingly acquired the rights of self-determination, sovereignty, and independence, which they possessed before their integration into the Soviet Empire. Moreover, leaders in some republics began to question the legality of the republics' integration into the Soviet Union. International law provided concepts on which the republics could base their claims of economic and political sover-

eighty and independence. The internationally recognized principle of self-determination could be used directly against the center. In response, the union defended its position with arguments based on a traditional view of federalism.

The republics undermined and finally destroyed the socialist federation because they took action against its main features. From these developments, one may conclude that the following features are necessary for long-term stabilization of a federation: (1) a stable equilibrium between center and periphery, including a political order supported by the federation's component entities; (2) a self-sustaining center vested with political sovereignty, legal supremacy, and the instruments to enforce its decisions and laws; (3) a supreme constitutional framework serving as the foundation of the federation's legal order, limiting the central government's power, and providing for legal and political mechanisms to solve power conflicts; (4) meaningful autonomy of the federation's component entities, protected by a political and legal framework; and (5) participation of a federation's component entities in the political process, particularly in the central government. A federation lacking one or more of these features will either lack stability, fail to establish a state, or suppress the autonomy of its component entities.

The course of events during the negotiations for a new union treaty also made it clear that dual sovereignty is not a viable concept because it does not decide who is supreme in a state, and thus leaves open the question of sovereignty. The events in the aftermath of the failed coup clarified the supremacy issue, and paved the way for an international law-based approach to a new union equilibrium. Thus, the transition in the Soviet Union confirmed Professor Pescatore's theory that federalism can be regarded as a philosophy that adapts itself on both the municipal and international levels.⁸⁰² Federalism combines the necessity of unity with respect for the autonomy and legitimate interests of the participating entities.⁸⁰³ Of course, the legal basis and the shape of federalism will differ considerably if a union of states is created, rather than a single federal state.

The establishment of the CIS put an end to the Soviet Union as a federation and as a state. At the same time, it institutionalized the process of contract-based cooperation among the newly emerging

802. See *supra* text accompanying note 88.

803. *Id.*

states. As a consequence, international law has replaced Soviet law as the regulator of relations among the republics.

The international law principles relating to state cooperation are more flexible than the rather rigid framework of federalism. An international law-based federal compromise enables component entities to design a structure according to their needs, while preserving their statehood and right of self-determination. While the new nations want to preserve their newly gained freedom and sovereignty, the legacy of the Soviet Union's Communist system, economic interdependencies, and ethnic and minority problems require close cooperation. Meaningful cooperation requires the new states to sacrifice some of their sovereignty. Further, the chosen methods of cooperation must adequately address the problems at issue. Otherwise, one or several volcanos could emerge on the territory of the former Soviet Union: a "volcano of nations";⁸⁰⁴ a volcano of economic and social problems; a volcano of nationalism and militarism.

The CIS is not an adequate structure for addressing all of these paramount issues. In view of its institutional deficiencies, one can only hesitantly label it a confederation. However, it has started a process. The states involved still may decide to establish closer institutional ties among themselves. Moreover, some of the deficiencies in the CIS may be counterbalanced by the further integration of the new states in Europe and in the international community. A superpower has broken down. Yet, the complete chaos that many predicted has not yet occurred. This is a good omen.

804. See *supra* text accompanying note 1.

